TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 546.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES L. CARSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED JANUARY 30, 1909.

(19,197.)

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a THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1903, Eighth Circuit, Greenville County.

J. L. CARSON, Plaintiff, Respondent,
vs.
SOUTHERN RAILWAY COMPANY, J. C. ARWOOD, and J. D. MILLER, Defendants, of Whom Southern Railway Company is Appellant.

Case Containing Exceptions.

T. P. Cothran, attorney for defendant, appellant.
McCullough & McSwain, attorneys for plaintiff, respondent.

1 *Case.*

Action for $15,000 damages on account of personal injuries received by plaintiff at Converse, S. C., August 16, 1902, at which time and place the plaintiff's arm was crushed between two cars which he was attempting to couple together. The complaint charges that the injury was caused by the joint and concurrent negligence of the defendants in having a defective coupling and in bringing the cars together suddenly and without warning to plaintiff. The action was commenced Sept. 24, 1902, in the court of common pleas for Greenville county; tried before Judge Watts and a jury at Greenville, November term, 1902; verdict for plaintiff against the Southern Railway Company for $6,500, upon which judgment was entered against Southern Railway Company on Dec. 4, 1902, for $6,500 and costs, $21.45. From this judgment the said defendant appeals. Notice of appeal served Dec. 6, 1902, in due time. Exceptions also served in due time.

Complaint.

The plaintiff complaining of the defendant alleges:

1.

That the defendant, Southern Railway Company, is a railway corporation chartered under and by the laws of the State of Virginia, and as such is, and was at the times hereinafter mentioned, doing business in the counties of Spartanburg, Greenville and other counties of the State of South Carolina, as a common carrier of passengers and also of freight, running its railroad track and trains, both passenger and freight, in and through the said counties of Spartanburg, Greenville, and other counties in the said State.

2.

That the defendants, J. C. Arwood and J. D. Miller, are now, and were on the dates hereinafter mentioned, citizens and residents of Greenville county, State of South Carolina.

2

3.

That the plaintiff is a resident of the county and State aforesaid, is thirty-five years of age, and has a wife and four children dependent upon his daily labor for a support—his oldest child being twelve years of age.

4.

That since December the 8, 1901, plaintiff was in the employ of the defendant, Southern Railway Company, and was on that day assigned the duties of flagman, and on the 15th day of August, 1902, was assigned by defendant to duty on a freight train belonging to the defendant Southern Railway Company, in charge of its agents and employees, known as second section of No. 43, and running between Spencer, North Carolina, and Greenville, South Carolina, and plaintiff was assigned the duty of flagman on said freight train.

5.

That plaintiff entered upon, and performed the duties of such position, and on the 16th day of August, 1902, was ordered by the conductor in charge of the said freight train, and whose orders he was required to obey, to do the work of brakeman on the said freight train—the regular brakeman on the said train having been assigned other duties.

6.

That while the said freight car was at a station known as Converse, in Spartanburg county, State aforesaid, the right arm of plaintiff was crushed by a collision of two freight boxes, whereby plaintiff suffered great and excruciating pain and mental anguish, and as a result lost entirely the said right arm, which had to be amputated; and that said collision and injury, which plaintiff sustained by reason thereof, were due to the joint and concurrent negligence, carelessness and fault of the defendants, and to their joint and concurrent recklessness, carelessness, wilfulness and wanton disregard of the plaintiff's rights and safety, in the following manner, to-wit: that between Charlotte, North Carolina, and Greenville, South Carolina, at the said station of Converse, said freight train of

3 the said defendant, Southern Railway Company, stopped for the purpose of shifting to the side track of the said defendant Southern Railway Company, which side track was upon a steep grade and near the main line of defendant company, five freight cars or boxes; that there were at that time standing upon the side

track three other freight cars or boxes, and, in order to prevent the said cars or boxes from rolling down the said steep grade, it was necessary to couple the said three cars or boxes to the five cars or boxes to be shifted and left upon the said side track, and this plaintiff was directed by the defendants to make the said coupling; that the defendant, J. C. Arwood, was conductor, and the defendant J. D. Miller, was engineer upon the said freight train; that the said freight boxes or cars were provided with what is commonly known as automatic couplers, and when said couplers are in good condition it is unnecessary for one in order to make the said coupling to go between the said cars, but the said couplers worked with a pin and iron crank, the handle of which iron crank projects to the side of the said boxes or cars, and the said pin by which the said cars are coupled is manipulated by using the said crank; that after having effectually made one coupling between the said cars, as directed by the defendants, plaintiff approached to make the other coupling, as directed by the defendants, and before doing so he warned the defendants to hold said car steady until he, the plaintiff, was ready to make such coupling and until plaintiff should so signify; that when plaintiff reached the said car, then to be coupled, he ascertained that the coupling pin was out of and lying upon the draw head of the coupler, and thereby ascertained that the said coupler was out of order, in that when the said coupler is in proper condition there is what is known as a Carter pin running through the said coupling pin at the lower end, thereby preventing it from being drawn entirely out of the said draw head, and the defendants knew, or ought to have known, that the said coupling pin was out of order,

4 and this fact made it necessary for the plaintiff to go between the said cars for the purpose of adjusting the said pin with his hand, and to carry out the order of the defendants, since he could not while it was in that position, adjust it with the iron crank above described; and this plaintiff went between the said cars for the purpose of adjusting the said pin in order to make the said coupling, and as he was directed by the said defendants, when he heard the cars of the said train in motion and knocking together before he had effected the said coupling, or had sufficient time, so to do, and in order to save himself from being crushed between the said cars the plaintiff attempted to get out from between the said cars which he was engaged in the work of coupling, and as he did so his right arm was caught between the dead blocks of the said freight cars, between which he was standing, and was horribly mangled; that at the time plaintiff heard the cars in motion he had only time to go between the cars, and had placed his left hand upon the iron crank and his right hand upon the pin for the purpose of placing it in proper position, and had not had time to place the pin in proper position, or to couple the said cars; that the defendants by their joint and concurrent negligence, and by their joint and concurrent carelessness, negligence, recklessness, wantonness and wilfulness backed the said engine, to which *was* attached the said

freight cars, without any signal or warning from this plaintiff, and without giving this plaintiff time to effect the coupling of the said cars, and without giving this plaintiff any notice or warning whatsoever that the said engine and cars were to be moved.

7.

That in consequence of the said injury, it was necessary to amputate plaintiff's right arm just above the elbow, and in consequence of the said injury and amputation plaintiff has suffered great mental anguish and pain and — deprived of the use of his strong right arm for the support of himself and family, all to his damage fifteen thousand dollars.

Wherefore, plaintiff prays judgment against the defendants for the said sum of fifteen thousand dollars, and for the costs of this action.

McCULLOUGH & McSWAIN,
Plaintiff's Attorneys.

The Demurrer.

The defendants separately demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The specifications are correctly set out in the exceptions. The demurrer was overruled. Defendants except.

The Answer.

The answer of Southern Railway Company was as follows:

Answer.

The answer of the defendant, Southern Railway Company, respectfully shows:

1. That the statements contained in paragraphs 1, 2 and 4 of the complaint are admitted.
2. That it has not knowledge or information sufficient to form a belief as to the statements contained in paragraph 3.
3. That it denies the statements contained in paragraphs 5 and 6.
4. That it admits the allegation in paragraph 7, that plaintiff's arm was amputated and that he suffered pain therefrom. The remaining allegations of said paragraph are denied.
5. That each and every allegation of the said complaint not herein admitted is denied.
6. That the plaintiff's alleged injury was the result of his own negligence.

7. That if this defendant were in any wise negligent, which it denies, the alleged injury to the plaintiff resulted from his own negligence contributing thereto as a proximate cause thereof.

6 Wherefore the defendant prays judgment that the complaint be dismissed with costs.

T. P. COTHRAN,
Attorney for said Defendant.

(Verified)

The separate answers of J. C. Arwood and J. D. Miller were identical with the above.

The Testimony.

J. L. CARSON, the plaintiff, sworn, testified as follows:

(Direct examination by Mr. McCULLOUGH:)

What is your name?
J. L. Carson.
You are the plaintiff in this action, I believe?
Yes sir.
How old are you?
Thirty-five years old.
Have you a family?
Yes sir.
How much of a family have you?
A wife and four children.
How old is the oldest one?
Twelve years.
How young is the youngest one?
Nineteen months.
How long were you employed by the Southern Railway Co.?
Eight months.
Now, before this accident occurred, by which you lost your arm, what duty had you been performing?
I had been performing the duty of flagman.
Now, when were you ordered to perform the duty of brakeman?
On the 16th day of August.
On the same day you were injured?
Yes sir.
The Southern railway, I believe, runs through North Carolina, South Carolina and Georgia?
Yes sir.
Engaged in handling inter-state commerce?
Yes sir.
Mr. Cothran—do you know that of your own knowledge*ledge*?
No sir.

Who was the conductor?
Mr. Arwood.
Who was the engineer?
Mr. Miller.
I believe you live in Greenville?
Yes sir.
How much did you make while employed by the Southern Railway Co.?
$50.00 per month.
7 Did you have any other means of supporting yourself and family besides your wages?
No, sir; it is only by the courtesy of my groceryman and landlord that I have gotten along as well as I have this far.
What was the number of the train you were running on as brakeman?
The second section of 43.
Between what points?
From Spencer, N. C., to Greenville, S. C.
Who was the regular brakeman on that train?
Mr. McDonald.
Why were you required to brake in his place?
He had been assigned to other duties.
What time did your train get to Converse, S. C.?
About 1.45.
What day?
The 16th of August.
What year?
1902.
Now, when you got to Converse what order, if any, did Mr. Arwood give you?
When we stopped there I looked and saw him on top of the train and he signalled for me to cut off all but one car and the caboose.
How many cars were on that train?
Twenty-two or twenty-three.
What do you mean by cutting off one car?
Well, cut all the other cars off but one car and the caboose.
Now, when the order was given to cut off all but one car and the caboose, what did you do?
Well, I cut them off, and then he said "Look out for the monkey switch," and when I did that he said "Look out for the main switch," and I went and unlocked it and he said "Look out and couple all the cars up."
How many cars were on that side track at that time?
Five.
He told you to couple those cars together?
Yes, sir.
What kind of coupling was on these cars?
Automatic.
What is an automatic coupling?

It is a coupling arranged so that you do not have to use a link or pin, and when the coupling is in proper order you do not have to go in between the cars to couple them.

If I understand you, the automatic coupling has a crank
8 on the outside of the box car and there is a pin at the other end of it and a pin in the draw-head, and in the lower end of the draw-head there is what you call the carter-pin—what are those things that come together?

Knuckles and lips.

Well, suppose these knuckles and lips, when the coupling is in good condition, and these knuckles are in such condition that they can't catch—what do you do?

Have to open them.

How do you open them?

Have to catch them with your hand and raise them up.

Does that necessitate your going in between the cars?

Yes, sir.

When the coupling is in good condition is there ever an occasion when you have to go between the cars?

Yes, sir.

The conductor knew that?

Yes, sir.

No-, when you went to effect this coupling—when you went to the first coupling what did you find?

When I went to make the first coupling I found it all right.

When you made the second one what did you find?

Found the coupling out of fix.

How was that?

Well, the pin that went through the draw-head had been pulled out and laid upon the top of the draw-head.

State what was necessary for you to do to make that coupling?

It was necessary for me to get the pin to make the coupling.

What did you say to the conductor?

I told him to hold steady until I made the coupling. When I went there and found the pin on the draw-head I went to work to make the coupling.

How did you do to make the coupling?

I took hold of it with my left hand so I could work the pin with my right hand, and about the time I got it in position to drop it I heard the cars knocking together behind me.

In what way?

Coming together, and then I turned to get out and was caught.

Just as soon as you heard the knocking what did you do?

I tried to get out.

9 So you knew what that knocking was?

Yes sir.

What was it?

Cars knocking together.

With what force?

Well it seemed to me they were knocking together with great force.

Then what did you try to do?

I tried to get out from between the cars, turned around and in doing so I turned my arm a little lower and the dead-block caught it.

What is the dead-block?

Pieces of iron about seven inches square, which stand on the cars, fastened on the cars about twelve inches from the center of the draw-head, from the outside.

Had you had time to affect the coupling when you heard the knocking?

No sir.

State with what rapidity you went at it?

I went at it very quickly.

State whether or not you gave any signal to any one to move that car?

No sir, I did not give any signal.

State whether or not you ordered them to hold steady until you made the coupling?

Yes sir.

State if you knew what the custom of the brakeman is in regard to moving the cars—does the conductor wait until the brakeman gives the signal?

Well he is not obliged to do it; he controls the train.

Well, what is the custom?

He generally waits for the signal.

Was there any other appliances furnished you to make that coupling but the automatic coupling?

No sir.

Were you coupling that car with a stick and link—what kind of coupling are these?

They are old-fashioned couplings, not in use now.

What kind of link is that?

A link about twelve inches long.

How did you manipulate them?

Raise them with a stick.

You say they are not in use now?

No sir.

They are not in use by the Southern railroad?

No sir.

What was the result of that collision?

My right arm was crushed.

What did they do with you?

They took me to Spartanburg and left me there with a physician.

What did they do with your arm?

Amputated it.

Tell the jury if you suffered much with that arm?

Yes sir.

Do you suffer yet?
Yes sir.
Who treated it?
Dr. Earle.
Who was the company's physician?
Dr. Dean.
When did he quit treating it?
I can't say the date.
Why did he quit?
He said the company instructed him to quit.
Are you in any kind of employment?
No sir.
Who is the entire support of your family?
No one but myself.
Unless you can do it, it is a helpless case?
Yes sir.
Are you able to teach school, or keep books?
I have had no experience of that kind at all.
Had no experience?
No sir.
Have you had any experience in anything but manual labor?
No sir.
(Presents paper) I wish you would explain this rough draft, Mr. Carson.

Witness takes paper before the jury and explains the location of the box car on the side track, and the train at place of the accident.

What is the character of the ground where this side track is?
A very steep grade.
A very steep grade?
Yes sir.
And Mr. Arwood told you to couple those cars together?
Yes sir.
The side track was where?

(Points out side track on draft.)

Where was Mr. Arwood?
On top of the car next to the caboose, about twenty-five feet from where I was between these cars that I went to couple until I got to the railroad crossing.
How far was it?
About thirty or thirty-five feet.
What was the character of this ground?
A very steep grade and sharp curve.

(The draft referred to offered in evidence by Mr. McCullough.)

When you told the conductor to hold that car steady till you could affect that coupling, did you say it loud enough for him to hear you?

Yes sir.

Was there anything to obstruct the sound?

No sir.

Did you look at him?

Yes sir.

And hollered it out to him?

Yes sir.

Was this your regular run?

No sir.

Why were you at it?

I had been called the day before to go out in another man's place—what we call doubling out.

Why did you make that run; for the compensation there was in it?

Yes sir.

What is the age of you- children?

The oldest one is 12 years, the second one is 9 years, the third one 6 years and the youngest one is 19 months.

How many have you in school?

The three boys are in school—the baby is a girl.

(Cross-examination by Mr. COTHRAN:)

You say that Mr. McDonald was assigned to other duties?

Yes sir.

What was that duty?

To remain on top of the car and transmit signals from the conductor to the engineer.

He was a train hand?

Yes sir.

And you were a train hand?

Yes sir.

Were not those three cars and the caboose left on the main track?

No sir, only one.

Wasn't there three cars left opposite the station?

No sir; there were two cars left opposite the store room.

Are you certain that Mr. Arwood told you to couple those cars together?

Yes sir.

Is it the custom to couple cars together on the side track?

Yes sir, where it is a steep grade.

What for?

To keep them from getting away by running down the grade.

Isn't it customary to keep brakes on them?

Yes sir, when the brakes are good.

Which side of the side-track were you on; the south side or the store side?

Store side.

12 You first threw the monkey-switch?

Yes sir.

Then the main line switch?

Yes sir.

Then came on the south side?

Yes sir.

Then crossed the track?

Yes sir.

Went pretty fast?

Well I kinder trotted along.

Between the rails?

No sir.

When you got to the first car did you tell the conductor to hold things steady?

No sir, not until I made the first coupling.

Why didn't you tell him then?

Well he could see me then.

Which side did you make this coupling from; the store side?

Yes sir.

Were you between the cars and platform when you made the first coupling?

Yes sir.

Out of sight of the conductor?

Well I could see the conductor.

Over the cars, or how?

I saw him between the cars.

And you say you hollered to him to hold that train steady until you made that coupling?

Yes sir.

Why did you do that?

Well I thought the train might come back against the other cars and start them off and cause me to lose my position—or something of the kind.

After you made the first coupling was the train steady?

Yes sir.

Then you went down to the next car?

Yes sir.

How far apart were the cars?

About four feet.

You knew the engine was attached to the other part of the train?

Yes sir.

Did you tell Mr. Arwood about not moving the car before you discovered the carter-pin was out of fix?

Yes sir.

When you found the pin was out of fix you went between the cars?

Yes sir.

And adjusted it with your hands?
Yes sir.
You didn't tell Mr. Arwood that the coupling was out of fix?
No sir.
If it had not been out of fix you could have managed it with the crank?
Yes sir, if the knuckles were all right.
13 Wasn't it necessary to notify him when you found the pin gone?
No sir, I think not.
You didn't holler "Come on back"?
No sir, I didn't give any signals at all.
Did you notice any one on the store porch?
Yes sir, I saw some men on there when I passed.
The track runs parallel with the porch?
Yes sir.
You saw some men there?
Yes sir.
You didn't know them?
No sir; I don't know how many were there.
You knew it was dangerous to go between the cars when the engine was hitched to them, didn't you?
Didn't know it without the engine was moving.
Didn't you know it was dangerous when the engine was attached to them?
No sir.
Is that your signature? (Presents paper)
Yes sir.

Receipt for rule book offered in evidence, as follows:

Received of W. S. Frost, Rule Book 4099, and one switch key.
J. L. CARSON.

Who is W. S. Frost?
Train master at that time.
What road?
Southern.
What rule book did you receive?
I don't remember what number it was. I received a rule book from the Southern railway.
Is this the book you received? (Presenting book)
Yes sir, that is the one I had.

(Rule book offered in evidence by Mr. Cothran—marked "Exhibit B")
Mr. McCullough objects to rule book going in as evidence.
Objection overruled.
The rule book contains the following rules:
"10. Cars must not be coupled or uncoupled or pin set by hand. For this purpose brakemen will use sticks, which will be furnished

them on application, and every brakeman is required to supply himself with one of these sticks, and see that it is long enough to prevent his going between cars to couple or uncouple them or to
14 set pins. Any employee going between cars while such cars are coupled to the engine, or being so coupled, for the purpose of coupling or uncoupling cars, or to set pins or links, or for any other purpose while the train or cars are in motion, does so at his own risk."

"11. Every employé must exercise the utmost caution to avoid injury to himself or to his fellows, especially in the switching of cars, and in all movements of trains, in which work each employé must look after and be responsible for his own safety. Jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them and all similar imprudences are dangerous and in violation of duty. All employés are warned that if they commit these imprudences it will be at their own peril and risk."

"12. Every employé is hereby warned that before exposing himself in being on the track or grounds of the company, or in working with, or being in any manner on or with its cars, engines, machinery, or tools, he must examine for his own safety the condition of all machinery, tools, tracks, cars, engines, or whatsoever he may undertake to work upon or with, before he makes use of or exposes himself on or with the same, so as to ascertain, so far as he reasonably can, their condition and soundness; and he is required to promptly report, either to the superintendent, or to the agent, who may be his immediate superior officer, any defects in any track, machinery, tools or property of the company affecting the safety of any one in using or operating upon or with the same. The object of this rule is to prevent employés from suffering personal injury from any cause. While this company will be responsible to each one for the discharge of all its duties and obligations to him, and for any fault and neglect of its own, or of its board of directors or general officers, which are the approximate cause of the injury, yet it will not be responsible for the consequences of his own fault or neglect, or that of
any other employés of the company, whether they or any of
15 them are superior to him in authority, as conductor, foreman, or otherwise; it being the right and duty of every employé, under all circumstances, to take sufficient time before exposing himself, to make such examinations as are here required, and refuse to obey any order which would expose him to danger."

"85. A train must not start until the proper signal is given."

Is that your signature (presenting letter)?
Yes sir.

Offered in evidence by Mr. Cothran: letter dated at Gastonia, N. C.—marked "Exhibit C."

Letter offered in evidence as follows:

GASTONIA, N. C., *Dec. 2nd*, 1901.

Mr. W. S. Frost, Charlotte, N. C.

DEAR SIR: I respectfully make application to you for a position as flagman on your division of the Southern railway. Have had some experience in this line. I respectfully refer you to Mr. C. M. Nolan, agent at this place, Mr. J. E. McLaughlin, of Kings Mountain, N. C., and would be pleased to hear from you soon.

Yours respectfully, J. L. CARSON.

Is that your signature (presenting paper)?
Yes sir.

Application for employment to the Southern Railway Co., offered in evidence, as follows:

SOUTHERN RAILWAY COMPANY,
CHARLOTTE DIVISION, *Dec.* 8, 1901.

Record of James L. Carson, who makes application for employment with this company in train service.

1. Full name?
James L. Carson.
2. Age?
33.
3. Weight?
150.
4. Height?
5 ft. 5½ in.
5. Born?
1867. State? S. C. Town? Yorkville. County? York.
6. Married or single?
Married.
7. White or colored?
White.
8. Residence of father, family, or immediate relatives?
State—N. C. Town—Gastonia. County—Gaston.
9. State of health?
Good.
16 10. If insured, in what company and what amount?
None.
11. State if eye-sight and hearing are good. If defective, in what respect and to what extent?
Good.
12. State experience in railroad service, giving capacity of service, time, and with what road?
Two years baggage man C. and L. R. R.
13. If ever discharged from railroad service, give cause and state from what road?
Never.

14. State when and by what company last employed—capacity, time, and cause of leaving.
S. C. & G. Ex. 30 days' light work.
15. Give name and addresses of parties to whom you refer.
C. M. Nolan and J. E. McLaughlin, ag'ts.
16. Were you ever employed on any of the divisions of this system, and in what capacity?
None.
17. Were you ever discharged from any of the divisions of this system? For what cause and when?
None.
18. Do you know that some of the bridges, including highway bridges and tunnels, on this road will not clear a man standing on a box-car, and also that it is dangerous to climb up the side of a box-car by the regular ladder or otherwise, while trains are moving?
Yes.
19. Do you know that it is dangerous to climb up the end ladder on a box-car while train is in motion, and as dangerous to go between cars, when in motion, for any purpose?
Yes.
20. Do you know that it is a positive rule that couplings must never be made or broken with the hand, and that this work must never be done without a stick?
Yes.
21. Do you know that the frogs, switches and guard rails on this road are not blocked, and there is risk of getting your foot caught or hung therein, and consequent danger of personal injury if you attempt to make or break a coupling while train is in motion?
Yes.
22. Will you abstain from the use of all intoxicating drinks while in the service of this company?
Yes.
23. Will you stay away from places where intoxicating drinks are sold, and lend your influence to help other employés do the same?
Yes.
17 24. Are you now, or have you at any time ever been, physically disabled from any cause? If so what?
None.
25. Will you study the rules governing employés on this road carefully, keep informed, and obey them?
Yes.

Signature, JAMES L. CARSON.

Witness:
W. S. FROST.

Is that your signature (presenting paper)?
Yes sir.

Mr. Cothran offered in evidence form 607—marked "Exhibit D."

SOUTHERN RAILWAY COMPANY,
CHARLOTTE, N. C., *Dec. 8th*, 1901.

I, James L. Carson, fully understand that the rules of the Southern Railway Company positively prohibit all persons from coupling or uncoupling cars, except with a stick, and provide that brakemen or others must not go between cars under any circumstances, for the purpose of coupling or uncoupling, or for adjusting pins, etc., when an engine is attached to such cars or train; and in consideration of being employed by said company, I hereby agree to be bound by said rule, and waive all or any liability of said company to me for any results of disobedience or infraction thereof.

I further understand and hereby accept, in consideration of such employment, the rule of the Southern Railway Company, requiring and putting upon me the individual duty of myself applying for and receiving from the proper officer of said railway company a sufficient stick of standard length for the purpose aforesaid, and of keeping myself supplied by such officer with such a sufficient stick of standard length at all times during my employment by said railway company in the coupling or uncoupling of cars.

I further understand that many foreign cars, which this line must necessarily handle and transport, have no bumpers attached to them, and that thereby the danger of going between the cars to couple or uncouple, or adjust pins, is greatly increased.

18 I further understand that employees are not required, compelled, *are* expected to go between cars when an engine is attached to such cars or train, to couple or uncouple cars or adjust pins, or for any other purpose.

I further plainly and explicitly understand, and now take notice, as part of this contract and regulation, that no conductor of any train, freight or passenger, or any engineer or fireman, or any other agent of the Southern Railway Company, has the right to waive or dispense with or suspend, or in any way alter or amend any of the provisions, conditions, contracts, stipulations, or regulations contained in this paper writing.

I am also hereby informed, and take notice of the fact and fully understand, that no conductor of any train, passenger or freight, engineer or fireman, or any other agent in and about said trains, has the authority to discharge, dismiss, or otherwise punish or injure me for adhering strictly to the conditions, stipulations, and regulations contained in this paper, or for failing to obey any order to violate said conditions, stipulations, and regulations, and I solemnly agree not to violate said conditions, stipulations, and regulations contained in this paper writing.

I was thirty-three years of age on the 29th day of August last past. I have read the above carefully and fully understand it.

JAMES L. CARSON.

Witness:
W. S. FROST.

I hereby certify that before —— —— signed the above, as appears by "his mark," — read the same over to him and carefully explained it.

—— ——.

NOTE.—Before any one is allowed to enter the service of this company as brakeman, flagman, switchman, or fireman, he must sign one of these forms; and previous to his signing, he must insert, in his own handwriting, above his signature, the words: "I have read the above carefully and fully understand it."

19 In cases where the would-be employee cannot read or write, his signature must be made with his mark, and the witness must fill up the certificate at the bottom, inserting the employee's name in the blank space left for that purpose, and must sign his (the witness's) name to the certificate—this signature of the witness to be in addition to his signature as witness to the employee's mark.

Mr. Carson, the part of this paper in manuscript—is that your handwriting?

Yes sir.

You wrote that part of it yourself—"I have read over the above carefully and fully understand it"?

Yes sir.

(Mr. Cothran offered paper in evidence marked—"Exhibit E.")

Mr. Carson, look at that photograph (presenting paper); is that a correct representation of the town of Converse?

Yes sir.

Will you indicate on the margin of the photograph No. 1, opposite point A, where you say Mr. Arwood was standing on top of the car? (Witness points out place on photograph.)

That shows very near the crossing, does it not?

That was before the crossing a little piece.

Indicate on the photograph in like manner where you made the first coupling.

I made the first coupling about here (pointing out place).

The point B, on photograph No. 1, is on the side track where you made the first coupling?

Yes sir.

(Photograph of the town of Converse offered in evidence by Mr. Cothran, marked—"Exhibit F." Photograph accompanying case.)

Mr. Carson, did you notice that the pin was out on the bumper before you went between the cars?

Yes sir.

This is a fact—that the pin came out when you lifted up the lever?

No sir.

You saw it lying on the bumper when you first went to the car?
Yes sir.
The first car was in four feet of the one you went to couple?
Yes sir, it was about four feet from the first car to the second one.
And a very close space between them and the store porch?
Yes sir.
So close that you say the roof had been struck by the train?
Yes sir.
Did you report to the conductor that this pin was out of order?
No sir.
You could have done so?
Yes sir.
But you didn't do it?
No sir.
Don't you know that if you had reported that to the conductor this accident would not have occurred?

(Objected to by Mr. McCullough.)
The COURT: That would simply be an opinion. Objection sustained.

After you made the first coupling you were standing on the north side of the side track?
Yes sir.
And the cars were between you and the conductor?
Yes sir.
And the side track is on a sharp curve?
Yes sir.
Didn't you know that it was impossible for you to see Mr. Arwood after the cars had been coupled together?
I saw him between the ends of the cars.
Between what?
Between the ends of the cars I had coupled.
Notwithstanding the sharpness of the curve?
Well, right at that point it is not so sharp.
When you went in between these cars for the purpose of coupling them could either the engineer or Mr. Arwood see you?
No sir.
They didn't know you were going to do that?
They knew that I went back there to couple the cars.
Neither of them knew that you was going in between the cars to adjust the pin with your hands?
No sir.
Neither of them could see you after you made the first coupling? Neither of them knew that the pin was out of order, so far as you know?
No sir, not to my knowledge.

Mr. Carson, if you had notified the conductor that the pin
21 was out of order, couldn't it have been remedied very easily?

(Objected to by Mr. McCullough. Under the act of 1895, it is the duty of the master to know the condition of the appliances furnished the servant.)

The COURT: He can describe the conditions.

What was necessary to remedy the defects in that coupling?

Well, the pin had been misplaced in the draw-head.

What kind of a pin is that?

Well, it is a lock pin about nine inches long, I suppose. I don't think they are all of a uniform size. They are not square; something like an inch and a half one way and an inch and three-quarters the other way, and it will only go in one way.

What pin are you talking about?

The pin that goes in the draw-head.

Well, I am talking about the carter-pin. How large is it, as large as a ten-penny nail?

Yes sir, something like that.

Well, the only defect was in the carter-pin?

Yes sir, and the lock pin was pulled out.

That could have been remedied by putting a piece of iron in there?

Yes sir, after you put the lock pin in there.

It could have been done in two minutes?

Yes sir, after you put the lock pin in.

If you had reported that to the conductor it could have been fixed in two minutes?

Yes sir.

You say it could have been remedied in a minute?

Yes sir, it would not have taken long to do it, but it could not have been done in a minute.

You say it is customary while the brakeman is making a coupling for the conductor to wait until the brakeman notifies him before he moves the cars?

Yes sir.

Well, if that is customary, why did you tell him to wait until you gave the signal?

Well, I told him that and went on back to make the coupling.

22 You didn't know the defect was in the coupling when you told him to wait?

No sir.

You knew it was customary for the conductor to wait until the brakeman gave the signal, but you told him any way?

Yes, sir, it is a very steep grade there and I told him to wait.

It is difficult to couple cars there?

Yes sir.

Were there three cars on the side track coupled together?
Two of them were.
The last two?
Yes sir.
The last car was not coupled together?
No sir.
You can adjust the knuckles without stepping between the rails?
No sir.
You reached over and pulled out the knuckles—it don't take long to do it?
It doesn't take long.
Now you say it was impossible for you to have made the coupling in any other way?
Yes sir.
Could not adjust the pin without a stick?
No sir, that is impossible.
One end of the lever extends beyond the side of the car?
No sir, not at all of them.
It extends to the end of the car?
Some of them do and some of them are twelve inches on the inside.
In easy reach?
Yes sir.
You raised the lever?
Yes sir.
If that pin was out why couldn't you raise that lever and adjust that pin with a stick?
Well, you can do that.
Couldn't you hold the lever with your left hand, and lower the lever and put it in with a stick?
No sir.
State why not?
Well, as I said a while ago, there is only a certain way that the pin will go in. You cannot make the coupling except in one way.
You say you couldn't have made the coupling any other way?
No sir.
Couldn't you have notified the conductor?
Yes sir.
That would have delayed the train, but that could have been done?
Yes sir.
Well, you are mistaken, you didn't do it the only way possible?
I did it the only way possible for me to do it.
23 Couldn't you have gone to the conductor and had him to stop the train?
Yes sir.
But you chose to go in between the cars when the engine was attached to the train, and no one could see you?
I was instructed to make that coupling.

Were you instructed to go in between there and make that coupling with your hands?

No sir.

You went in there where no one could see you?

I don't know whether or not anybody saw me.

Well, the engineer and conductor could not see you?

No sir.

Didn't you know that it was risky to go in between there when the engine was attached to the train?

Well, it is done every day.

Didn't you know it was particularly risky when the engine was attached to the cars?

Well, I didn't know it was any more risky there than anywhere else.

Don't you know that the rules require that when there is a defect ascertained with the appliances which you are required to work to report that immediately to the conductor?

(Mr. Cothran has witness to read the rule to the jury.)

Mr. McCULLOUGH: May it please your honor, I don't know that this is the proper time to raise the question, but we will ask your honor to charge the jury on the act of 1895.

Mr. Carson, you knew the defect was in that coupling before you went in between the cars?

Yes sir.

You didn't report it to the conductor?

No sir, I saw what the trouble was and went in there to fix it.

You went in between the cars without telling the conductor what kind of a condition it was in?

Yes sir.

(Mr. Cothran has witness to read rule 10 to the jury.)

That rule was in the book furnished you?

Yes sir.

And the other one too?

Yes sir.

Mr. Carson, give the jury your exact words when you told the conductor to hold steady until you effected that coupling?

24 I said pretty loud, "Now hold steady until I make the next coupling," and then I proceeded to go back and make the next coupling.

Did you look at him when you told him?

Yes sir.

Describe to the jury how you attempted to effect that coupling.

Well, I went there and saw the pin out on the draw-head. I went to adjust it with one hand and took hold of the lever at the end of the car; after I did that with my left hand, I reached over with my right hand and picked up the pin and got it in position to drop into the hole in the draw-head, where it belonged; and about the time

I got it there I heard the cars knocking together at my back, and as soon as I heard them I dropped the pin and turned to step out from between the cars.

You had your back to the engine?

Yes sir.

And the car nearest to you was not more than four feet from you?

No sir.

And the engine was attached to the train?

Yes sir.

Re-direct examination by Mr. McCULLOUGH:

The counsel asked you yesterday why you went on the other side from the conductor to affect the second coupling; why did you do it?

Because the lever was on the other side of the car.

So that is why you went around; the lever was on the other side?

Yes sir.

Counsel asked you a while ago if you could have made this coupling with a stick?

No sir, I could not have made it with a stick.

Explain to the jury why you could not have made it with a stick.

Well, as I said just a minute ago, the pin is about one and a half inches one way and one and three-quarters the other way and there is only one way to get it in there, and it won't work until you do get it right. There is a little notch cut out in the pin and that slips in and locks it, and if you don't get the pin in right it won't work.

The only other way you could have effected the coupling would have been with a stick with fingers on it.

25 I would have had to have a stick with some appliance—with something on it to get the pin in position.

Did you ever see a stick with fingers on it?

No sir.

Did I understand you to say that you were a flagman and had been transferred as brakeman that day?

Yes sir.

Which were you the most familiar with; the rules of flagman, or brakeman?

Well, I was more familiar with flagging, as I had been at it some time and had studied it up right closely.

The counsel on the other side produced some paper, and you stated that you wrote it and signed it (presenting paper)?

Yes sir.

Did they furnish you a copy of these?

No sir.

What did they do with the paper when you signed it?

It was returned to the train master.

Have you seen it before to-day?

No sir.

Do you remember the contents of this instrument of writing?
No sir.
State whether or not the railroad company required all parties to sign a paper like that?
Yes sir, they required all parties to sign that--that is in the traffic department.
Mr. Cothran asked you to read this rule, where brakemen must not couple cars with their hands; that they would
I will ask you to read rule 11. (Rule read by witness.) be furnished with a stick: did the company ever furnish you with a stick?
No sir.
State what kind of coupling that rule applies to.
To the best of my knowledge, it applies to the old fashioned pin and link coupling.
State how that is affected. Could you manipulate that pin and link with a stick?
Yes sir.
Could you manipulate this with a stick?
No sir, not without a stick for the purpose.
I wish you would state whether or not you understand what the construction of this rule has in reference to going between the cars to couple and uncouple them?
My judgment is that it is meant when the car is in motion.
Were these cars in motion when you went in between them?
No sir.
26 Mr. Carson, what is the air brake?
The air brake is compressed air, generated at the engine and transmitted through pipes through the train.
When you go to connect two of these pipes, what do you do?
Have to go between the cars.
State whether or not it is possible, with the appliances furnished now, to adjust the air tubes without going between the cars?
No sir, it is impossible.
The conductor knew that fact?
Yes sir.
They see men going between them?
Yes sir.
They never object?
No sir, not when the cars are standing still.
So, as I understand it, it is necessary to go between the cars to adjust the knuckles and also to connect the air brakes?
Yes sir.
Did they ever tell you about the rule of going between the cars?
No sir.
I will ask you to read rule 85. (Reads rule 85: "A train must not start until the proper signal is given."
(Shows picture to witness.) What kind of coupling is that?
Janney coupling.

(Rule 85 offered in evidence.)

Now, as I understand you, it was the invariable custom on this and other trains of the Southern Railway Company that the conductor would receive signals from the brakeman when the brakeman was affecting a coupling?

Yes sir.

You did not give any signal at all when this occurred?

No sir.

Mr. Carson, I will ask you to read rule 367, page 67, in reference to the duty of the conductor.

(Read.)

I understand that is the rule book you kept in your possession?

Yes sir.

They didn't give you a copy of the other little paper you signed?

No sir.

Well, whose duty is it to give signals when a coupling is being made?

The man who is making the coupling,

That is the custom, the man who affects the coupling gives the signals?

Yes sir.

27 Mr. Carson, I will ask you to read—under the head of engineering—page 107, rule 502.

(Read.)

Re-cross examination by Mr. COTHRAN:

Mr. Carson, all of the employees of the railroad in the traffic department are required to sign this form (presenting paper)?

Yes sir.

How do you know they sign it—you have seen others sign it?

Yes sir, signed some myself.

How many?

Three.

And you didn't know what they contained?

Well I read them over.

You say on the day of the accident you didn't know what was in the paper?

No sir, I didn't remember anything about it.

You didn't remember anything about it?

No sir.

You didn't remember their saying that brakemen must not go in between cars to adjust pins?

No sir, not when they were standing still.

Does this say anything about their being in motion?

I don't know sir.

Mr. Cothran reads over application to witness.

You say, although you signed these papers, you didn't know what provisions were in them?

No sir, I didn't know what was in them.

And there it *si* in your handwriting "I read over the above carefully and fully understand it."

W. D. McDONALD sworn testified as follows:

Direct examination by Mr. McCULLOUGH:

Who were you working for on the 16th day of August?

The Southern Railway Co.

What was your position?

Brakeman.

Brakeman?

Yes sir.

Were you a regular brakeman on the train that injured Mr. Carson—were you working as brakeman on that train?

Yes sir.

You were the regular brakeman?

Yes sir.

28 Do you remember when the train got to Converse?

Yes sir.

What order did Mr. Arwood give you in reference to cutting off the cars?

I never heard any; I was on top of the train.

How many cars were left on the main track?

One car.

With what?

With the caboose.

Where was Mr. Arwood?

On the car cut off with the caboose.

Where were the other cars?

We were going to put them on the side track.

You were going to leave five cars on the side track?

Yes sir.

How many cars were on the side track?

I don't know sir.

Where was your position?

I was some eight or ten cars from where they were cut off.

What were you doing there?

Transmitting signals from the conductor to the engineer.

How many freight cars were on the train?

I don't remember—something like 23 or 24.

Do you remember the time when Mr. Carson was injured by the collision?

Yes sir, I know when it was, for I heard him holler.

I wish you would state to the jury whether or not you received a signal to back the train.

Yes sir, I received the signal and transmitted it to the engineer.
In consequence of that, what did he do?
He backed the train.
Then how long before you heard him holler?
Right immediately; I stopped the engineer and went back there.
What did you find?
I found him with his arm crushed.
How long did you work for the Southern R'y Co.?
About nine months.
Who does the conductor get signals from when the brakeman is effecting a coupling?
He would get them from the brakeman or the man making the coupling.
29 Well, when you went in between the cars to effect the coupling, was it the custom of the conductor to wait until you gave him the signal?
Yes sir.
I wish you would state, when the automatic coupling is in perfect order, whether or not it is necessary to go between the cars to adjust the knuckles?
It is necessary nearly all the time to go in there and adjust them; the knuckles are liable to be closed.
State whether or not it is possible to open them any other way than by going between the cars?
No sir, it is impossible to do it in any other way.
State whether or not Mr. Arwood and the other conductors see the brakemen going between the cars for that purpose?
Yes sir.
Did they ever object?
No sir.
Is there any rule forbidding it?
There is a rule forbidding brakemen going in between the cars when they are in motion.
State whether or not you have to go in between the cars to adjust the air brakes?
Yes sir.
Can they be adjusted in any other way?
No sir.
Did the company ever furnish you a stick to brake with?
No sir.
Could these cars Mr. Carson was injured with have been coupled with a stick?
No sir, they were automatic couplers.
I wish you would state whether or not it is possible to couple them with a stick?
No sir, not these cars.
Have you ever seen cars coupled with a stick?
Yes sir, some time ago.

This was the old-fashioned coupling?
Yes sir.
Mr. McDonald, I wish you would state whether or not it is possible for one to adjust this particular pin if lying on the draw-head?
No sir, it would be impossible to adjust it with a stick.
Why?
Well, it only goes in one certain way.

Cross examination by Mr. COTHRAN:

Where were you when the train stopped at Converse?
On top of the train.
You heard no orders given to Mr. Carson at all?
No sir.
You cut loose all but one car and then got signals from the conductor?
Yes sir.
What did you do then?
I transmitted them to the engineer.
Well tell what you did?
I got a signal to come back and transmitted it to the engineer, and then I heard the man holler and went down there.
Are you sure the train stopped after the first coupling?
Yes sir.
You say it is customary to go between cars to couple them?
Yes sir.
Is it customary to go between them when in motion?
No sir.
Is it customary to go between them and adjust the pin when in motion?
No sir.
Is it customary to go between them to couple the air hose while the cars are in motion?
No sir.
Well, if a man would catch hold of the lever with his left hand and attempt to adjust the pin with his right hand, where would that throw his elbow, with reference to the dead-block?
Well, it would be owing to where he was standing.

Re-direct examination by Mr. MCCULLOUGH:

I understand from what you say that the train stopped after the first coupling?
Yes sir.
Stopped dead still?
Yes sir.

Re-cross examination by Mr. COTHRAN :

Did you sign a form like this (presenting form)?
Yes sir.
Are you familiar with it?
Yes sir, I read it over.

Re-direct examination by Mr. McCULLOUGH.

Did they ever return it (form) to you ?
No sir.
What did they do with it?
Forwarded it to the train master.

31 M. C. FAYSOUX, being duly sworn testified as follows:

Direct examination by Mr. McCULLOUGH :

Were you ever in the employ of the Southern Railway Company?
Yes sir.
How long were you in their employ?
From July, '89, to August, 1900.
What was your position?
Flagman for the first twenty-four months and conductor for the rest of the time.
Flagman for the first twenty-four months and conductor for the rest of the time?
Yes sir.
Did you sign a paper like this?
Yes sir.
Did they require you to sign it?
Yes sir.
State whether or not they require all the employees in the transportation department to sign it?
Yes sir.
What did they do with it when you signed it?
It goes to the train master.
State whether or not you are familiar with the automatic coupling?
Yes sir.
State whether or not, when the knuckles are closed and in good condition, if it is possible to open them without going between the cars?
Well, it is owing to the kind of coupling you have. If it is a Janney coupling it is impossible to couple them without going between the cars.
State whether or not you are familiar with the automatic coupling?
Yes sir.

State whether or not, if the knuckles are closed and in perfect condition, it is possible to open them without going between the cars?

Well, it is owing to what kind of coupling it is. If it is a Janney coupling it is impossible to open them without going between the cars.

Impossible without going between them?

Yes sir.

Will you state whether or not you are familiar with the old-fashioned pin and link coupling—were they in use when you went there?

Yes sir, but I hav'n't seen them for some time. It has been about three years ago.

Well, I understand that you would have to go between the cars to adjust the old-fashioned coupling?

Well, you would have to go in there to adjust the pin; the
32 pin would be lying on the draw-head and you would have to go in there to adjust that pin.

What about the air brakes; could they be adjusted without going between the cars?

No sir.

So it is absolutely necessary for the brakeman to go between the cars to adjust these air brakes and couplings?

Yes sir.

You saw it done while you were conductor?

Yes sir, and I did it myself.

Did you ever object to it?

No sir.

I wish you would state to the jury what is the custom when the brakeman is effecting a coupling, in reference to the movement of the cars. Does the conductor get the signals from him?

Whenever I instructed a brakeman to couple a car I would have to work by his signals.

Why?

Well, he would be doing the work and I could not back the train over him without his telling me what he wanted.

Why couldn't you do it?

Well it would be a matter of murder to run back on him.

Well, the conductor would wait for the signal from the brakeman?

Yes sir, the rules require us to get signals from each other.

Cross examination by Mr. COTHRAN:

You signed a paper like this (presents paper)?

Yes sir.

You know what it provided?

Yes sir.

And to adjust the knuckles of an automatic coupling, it is necessary to go between the cars?

Yes sir.

Is it necessary to go between them when in motion?
No sir.
That is against the rule?
Yes sir.
Well, in coupling the air hose, is it necessary to go in between them while in motion?
Well, that is impossible.
Well you knew it was against the rules to go between cars to adjust the air brakes and coupling knuckles in brake pins while the cars are in motion?
Yes sir.

Could Mr. Carson have made that coupling in any other
33 way besides with his hands?

No sir it was a Janney coupling.
Well, he could not have done it any other way than with his hands?
No sir.
Couldn't he have notified the conductor?
Yes sir.
That would have stopped everything?
Yes sir.
So that was not the only way to do it?
Well, he could have notified the conductor and engineer.
Are you familiar with the surroundings at Converse?
Well, it has been six years since I have been there.
Did the rule require the cars on the side track to be coupled together?
No sir.
You had this rule book?
No sir, not that kind.

Re-direct examination by Mr. McCULLOUGH:

Counsel asked you if there was any way to affect that coupling without going between the cars?
No sir.
Well, counsel asked you if it was necessary to couple cars together on the side track. Suppose these cars were on a side track on a steep incline and you wanted to cut them off and put five more cars in, state whether or not it would be necessary to couple them together to keep them from moving down the grade?
No sir, it would — be necessary unless they were near the end of the switch.
Well, suppose they were near the end of the switch?
Well, you would have to couple them or shove them back.
Suppose the first car was standing on the side track near the monkey switch, would it be necessary to couple them together?
Well, it would be necessary to couple them or shove them back.
Well, suppose it was a steep incline?

Well, it would be better to couple them together as a matter of safety. If he were to shove them back, unless they had good brakes, they would be liable to run out. I don't know how that place is now. It used to be a steep grade.

Re-cross examination by Mr. COTHRAN:

If the brakes were on the cars it would be safe to shove
34 them back, would it not?
Not as safe as to couple them.
Why?
The chain might break.
Well, it was not necessary to couple the cars together?
No sir, not only as a matter of safety.

J. L. CARSON, recalled, testified as follows:

Direct examination by Mr. MCCULLOUGH:

Mr. Carson you stated yesterday that the cars where near the monkey switch?
Yes sir.
The first car was near the main track?
Yes sir.
About where is the monkey switch on this (presenting photograph to witness)?

(Witness points out position of switch.)

Did you ever see an attempt to cut off cars on that side track without affecting a coupling?
Yes sir.
Who was the conductor?
Mr. Chappell.
What was the result?
The cars ran down the side track.
What was the result?
One car was torn up.
How long before this happened?
About three months.
State whether or not the train master knew t hat this had happened?
Yes sir.
Before you made the coupling on August 16, 1902?
Yes sir.
That was a Janney coupler?
Yes sir.

Cross examined by Mr. COTHRAN:

You knew that the cars had been left in there without coupling them together—with the cars standing there?
No sir.
Had you had any experience there?
Yes sir.

L. B. BROWNING, being sworn testified as follows:

Direct examination by Mr. McCULLOUGH:

Mr. Browning were you ever in the employment of the Southern Railway Company?
Yes sir.
What was your position?
Flagging was the last work I did.
How long was you in their employment?
Four years and eleven months.
35 Are you familiar with the Janney coupler?
Yes sir.
I wish you would state to the jury whether or not, when you went to affect a coupling with the Janney coupler, if it was in perfect condition, whether or not you would have to go between the cars to open the lips?
Yes sir.
Can they be opened in any other way?
No sir.
I wish you would state whether or not, when you went to adjust the air brakes, if you would have to go between the cars for that purpose?
Yes sir; it can't be done in any other way.
I wish you would state whether or not the conductors ever see the brakemen go between the cars for that purpose? Did the conductor ever see you going between the cars for the purpose of adjusting the knuckles or air brakes?
Yes sir.
Did he ever object?
No sir.
Do you know anything about the old-time pin and link coupling?
A little; not much.
Are they used any longer on the Southern railroad?
No sir, I haven't seen any for two years.

Cross examined by Mr. COTHRAN:

Is it not necessary to go between the cars when in motion?
No sir.
You can open the knuckles when the cars are still?
Yes sir.

Isn't that the time?
Yes sir.
How about the air brakes?
You adjust them when the cars are standing still.
That is the only way it can be done, isn't it?
Yes sir.

Mr. McCULLOUGH: We offer in evidence vol. 27, Supplement of the United States Statutes at Large, page 531.

Plaintiff rests.

The defendants moved for a non-suit upon the several grounds stated in the exceptions. The motion was overruled. Defendants excepted.

36 COURT: I am bound by the decision of the supreme court of this State, and I will overrule the motion for a non-suit.

Testimony of the Defendants.

A. C. ARWOOD, being sworn, testified as follows:

Direct examination by Mr. COTHRAN:

Where do you live?
In Greenville.
In the city?
Yes sir.
You are one of the defendants in this case?
Yes sir.
You are being sued for $15,000?
Yes sir.
Where were you at the time of the accident?
On top of the box car.
What was your position?
Conductor.
On No. 43?
Yes sir.
Tell the jury what happened at the time his arm was crushed?
Well, I had five cars to cut off and leave there, and in order to transmit signals to the engineer I let a man stand where he could see me. I just said to Mr. Carson, "You go throw the switches and look out for the cars on the side track." I was on a through freight and didn't have to take out any of the cars at all. My intentions were to throw the cars back, clear the side track and then pull out. When we pulled up I don't remember whether I saw him throw the derailing switch or not. He said "Come on back," and then he disappeared from my sight. I gave the man the signal to come back.

What car was that one?

The first car. I gave the signal to come on back slowly. The engineer slowed up suddenly and the train stopped, and the only word I heard was "Come on back."

From whom?

Mr. Carson.

Was he on the other side then?

Yes sir, there was a ware-house on the other side between me and the side track, and Mr. Carson disappeared then behind the end of a box car. I can show you how he disappeared, for this side track would be running this way (pointing out position on photo-
37 graph). Now, if the car was standing at the end of the derailing switch and he was trying to couple the car—that is what I didn't think he would do. I didn't give him any particular orders what to do. I gave him the order to throw the switch and look out for the cars on the side track, and I didn't care whether he coupled them together or not. I remember I said "Look out for the cars on the side track." I knew that the cars were there and I intended to shove them back on the side track clear of the main line, and that was the only word I spoke when the train stopped. I heard Mr. Carson say, "Come on back." I don't know whether he had made the first coupling then or not, and then I heard him give a signal; or rather, I heard him holler and it didn't sound right, and I stopped the train immediately and jumped off the car and went around there and found him sitting down holding his arm. If Mr. Carson went back there and went between the cars, which he did, he was beyond my view. You will notice that the warehouse there and the side track are on a quick curve, and when he went around there he disappeared from my view. It was impossible for me to see Mr. Carson through box car No. 9. I would have had to look over the top of the warehouse to see the box car. It would have been impossible for me to see Mr. Carson.

You mean it would have been impossible for you to have seen him when he went between the cars to make the coupling?

Yes sir.

Why not?

Couldn't see him for the top of the warehouse.

Couldn't you see him when he made the first coupling?

Yes sir, I could see him when he made the first coupling, for he was standing there with his right hand on the lever and the box car was standing on this sharp curve, and he would have been on this side at this end, and from there he disappeared from my view.

Which box car was he working on to make the first coupling?

I couldn't say.

After he made the first coupling did the train stop?

No sir, I couldn't say it did.

After he made the first coupling could you see him on the
38 other side of the string of cars?

No sir, I couldn't see him.

At that time did Mr. Carson give you any warning to hold the train steady until he made the coupling?
No sir, I never heard a word.
Are you positive of that?
Yes sir.
The only thing you heard from him was "Come on back"?
That is all I heard. I don't know whether he had made the first coupling then or not.
Will you indicate where you was standing?

(Points out on photograph where he was standing.)

You say you were standing there?
Yes sir.
How far were you from him?
It think probably thirty feet farther south than where the man is standing in the photograph.
You were standing thirty feet farther south than the man in the photograph?
Yes sir.
You were standing on top of the car?
Yes sir; I don't think I was standing there, I might possibly have been a car's length farther south.
How fast was your train running when you were backing in on the side track?
I couldn't say exactly how fast it was moving, but not very fast.
About how fast would you say?
About two or three miles an hour.
Is it customary to couple cars together on that side track?
It is owing to whether we are going to do any work there or not.
Is it customary to couple them together when you just leave the cars there?
No sir.
Did you intend to couple them together?
No sir.
Did you tell him to do that?
No sir.
All that you wanted to do was get clear of the main line?
Yes sir, just wanted to get clear of the derailing switch.
They have an engine at the mill to attend to that?
Yes sir.
A switch engine?
Yes sir.
Whose business was it to do that?
39 Well it is what we call a dummy line.
You were only a through freight?
Yes sir.
Your business was only to set the cars in there?
Yes sir.

Cross examination by Mr. McCULLOUGH :

I believe that the cars on the Southern railway are equipped with Janney coupling ?

Yes sir.

When the Janney coupling is in perfect condition with the knuckles and lips closed together, isn't it necessary to open them to effect the coupling ?

Yes sir.

Isn't it necessary for the brakeman to go between the cars to affect the coupling ?

Yes sir.

They have to go between the cars to adjust them when they are in perfect condition ?

Yes sir.

There are no appliances furnished them to do it with, without their going between the cars ?

No sir.

The old-fashioned pin and link coupling are not in use now ?

No sir.

Well, that is the kind you could manipulate with a stick ?

Yes sir.

They are not in use now ?

No sir.

When you went into this side track at Converse you wanted to cut off how many cars ?

I wanted to leave five cars there.

That side track is on a very steep grade, isn't it ?

Yes sir, it is a very steep grade.

Mr. Carson said you told him to cut off the caboose and one car ?

Yes sir, that is what we left on the main line.

And you took your position on top of the car ?

Yes sir.

Your regular brakeman was Mr. McDonald ?

Yes sir.

Mr. Carson was your flagman ?

Yes sir.

You ordered Mr. Carson to cut off one car and the caboose ?

Yes sir.

You said you told him to look out for the cars on the side track ?

Yes sir.

What did you mean by that ?

I thought he would get on top of the cars and put on the brakes.

Well, you told him to look out for the cars on the side track ?

Yes sir.

How many cars were on the side track ?

Three, I think.

Wasn't one car near the monkey switch ?

Yes sir, I think there was one standing near the cut off switch.

Don't you know it would be safer for him to couple these cars together?

Yes sir, it might have been a little safer.

Because if the brakes had given away the cars would have been liable to run down grade?

Yes sir.

Therefore, it was safer to make the coupling?

Yes sir, it would have been safer.

Now you didn't say that you did say for Mr. Carson to get on top?

No sir, I didn't say for him to get on top.

Did you see him go between the cars on the side track?

No sir, he disappeared from my sight at the end of the cars.

Didn't you know he was engaged in coupling the cars?

No sir, I didn't know that.

Isn't it customary for the conductor to get signals from the men coupling cars?

Yes sir.

The first thing you heard from Mr. Carson was "Come on back"?

Yes sir.

You don't know whether or not he had made the first coupling?

No sir.

You don't know whether it was after or before he had made the first coupling?

No sir.

As a matter of fact, after that command, didn't the car stop?

Well, the car stopped.

After he gave that command didn't the car stop?

Well, I couldn't swear that it did.

Could you swear whether or not the car stopped?

I know the car stopped.

After he gave the command did the car stop?

No sir, it was before he gave the command.

Then you got a signal to come back?

Yes sir.

After you gave the signal did the car stop?

No sir, I gave the signal and the car came on back.

Can you swear whether it stopped after that or not?

I can't swear positively; I can only give it to the best of my recollection.

41 You say it is necessary for the brakemen to go between the cars for the purpose of adjusting those knuckles and air brakes.

Yes sir.

You never objected to it?

No sir.

You never called their attention to it that it was a violation of the rules?

No sir, it can't be done in any other way.

When you heard Carson make this particular noise you stopped the train and went to him?
Yes sir.
What was his position?
Well, he was sitting down holding his arm.
What was he sitting on?
A little crossing near the store.
What crossing was he at?
(Witness shows on photograph.)

Re-direct examination by Mr. COTHRAN:

You say that you saw the employés of the company go between the cars to adjust the knuckles and couple the brake hose; it is not proper for them to do it while the car is in motion?
They can't do it while the car is in motion.

J. D. MILLER, being sworn, testified as follows:

Direct examination by Mr. COTHRAN:

You were engineer at the time this accident occurred?
Yes sir.
From whom did you get the signal to back the train?
From the front train man.
Who was he?
Mr. McDonald.
How far back was he?
About six or seven car lengths.
You got signals from him and he took them from the conductor?
Yes sir.
When you got the signal what did you do?
I backed slowly.
On the siding?
Yes sir.
How fast?
Well, it is hard to say, but not over two miles an hour.
You knew the situation there?
Yes sir.
Well, tell the court and jury if you got the signal to back these cars?
Yes sir, there was a man left on top of the train to give me signals. Knowing that it was a steep grade and that there were
42 two or three cars on the side track, and it was in a cut, they put a train man there to give me signals. I never saw the man who coupled the cars.
Why couldn't you see the other man?
Well, they were on the other side, in the cut, and the warehouse was there.

Were you in the cut or on the curve?
No sir, I was in the cut after I got on the side track, but was on a sharp curve.
Was that what prevented you from seeing Mr. Carson?
Yes sir.
What was the next signal you got?
Slow up.
You obeyed that?
Yes sir.
What was the next one?
Come on back.
You did it?
Yes sir.
What was the next one?
To stop.
You did that?
Yes sir.
How many cars did you have in the train?
Twenty-two or twenty-three.
How many cars were left on the main line?
One car and the caboose.
Would there be any slack in a train of that length?
Yes sir.
How much?
Well, there would be a difference, in some trains more than others; owing to how much the cars had been used, but there would not be less than six or eight feet in a train of that length.
Did you get any warning to hold the train steady?
Yes sir.
When was that?
Well, I got a slow up signal.
Was that after the first coupling was made?
I don't know; I got a slow up signal and a stop signal.

Cross examination by Mr. McCULLOUGH:

When you got to Converse there were some cars to be put off on the side track?
Yes sir.
There were three cars on the side track already?
Couldn't say how many were there.
You moved up for the purpose of backing on the side track and stopped?
Yes sir.
43 And you backed in on the side track?
Yes sir.
And the next signal you got was to slow up?
Yes sir.
And then you stopped, and afterwards got a slow up signal?

I don't think I did; I didn't stop but the one time as well as I can remember.

Are you positive about that?

No sir.

After you got on the main line did you stop?

Yes sir.

And then you got a signal to back slowly?

Yes sir.

Did you get a signal to stop again?

Yes sir.

Wasn't that after you got the signal to back slowly?

Yes sir.

Did you stop then?

I believe I did; I couldn't say positively.

Did you back again slowly after the first stop?

Yes sir.

Then you stopped and heard of the accident?

No sir.

Well you kept on backing?

They cut me down and signaled me out. I didn't know about the accident until I was within a mile or two of Spartanburg.

You obeyed the signals of Mr. McDonald?

Yes sir.

When he would signal for you to slow up, you would do it?

Yes sir.

But you can't remember how many times you stopped?

I stopped once going in and once coming out. I stopped only twice.

You stopped and got a signal to come back slowly?

Yes sir.

And you came back slowly?

Yes sir.

And after that you got another signal to come on back slowly?

That was after the second time.

How long have you been in the employment of the Southern Railway Company?

Ever since it has been a Southern railroad.

Do you know any thing about a Janney coupling?

I never coupled one in my life.

Well, when they are in perfect condition and the knuckles are closed, is it necessary to open them?

It is necessary for them to be open to affect the coupling.

Don't you have to go between the cars to do it?

Yes sir.

44 Is it necessary to go between the cars to couple the air brakes?

Yes sir.

A. W. HUDGENS, being sworn, testified as follows:

Direct examination by Mr. COTHRAN:

You were agent at Converse at the time this accident happened?
Yes sir.
Where were you at the time of the accident?
I was standing in front of the window.
Where was Mr. Arwood standing?
On top of the box car.
Higher up than the man in the photograph—No. 1, that is you?
Yes sir.
With reference to your position there, where was Mr. Arwood standing?
Where I am standing there, right at this corner, the south corner, of the passenger waiting room.
He was on top of the car?
Yes sir.
How many cars were there?
One or two and the caboose.
At the time of the accident you were standing on the outside of the passenger station?
Yes sir.
You couldn't see Mr. Carson?
No sir.
Could you see the accident?
No sir.
You wanted five cars in there?
Yes sir.
How many cars were on the side track?
Three, I think.
Were they coupled together?
No sir. Two of them were—I think the switch engine set them in there.
They rarely ever coupled them?
No sir.
That is a steep grade there, isn't it?
Yes sir.
What per cent. grade is it?
I couldn't say.
Is there any enbankment at the other end?
Yes sir.
Whenever they set cars in there is it necessary to couple them together?
No sir, unless they are going to take some out.
Did you ever see it done without coupling them together?
Yes sir, many times.
Haven't you some measurments taken in connection with this?
Yes sir.

What are the measurements you took?

The first is the distance from the switch frog to the corner of the store, the southern corner, 104 feet; the second point, the southern corner next to the side track, 89 feet; and from the rear corner of the store back, 12 feet.

Those are the only measurements you took?

Yes sir.

You didn't measure from the side track where Carson was standing?

No sir.

Cross examination by Mr. McCULLOUGH:

What is your business?

Depot agent at Converse.

Have you ever had any experience at railroading?

Yes sir.

Have you ever been a conductor?

No sir.

Have you ever been a brakeman?

No sir.

Have you ever coupled cars together?

Yes sir.

How many?

Well, I couldn't say; a good many.

The most of your business has been punching tickets?

I couldn't say about that; I look after a good deal of freight.

Well, you have had no practical experience in railroading?

No sir.

You told the jury it was not necessary to couple those cars together on the side track?

Yes sir.

Well, suppose two old railroad men were to get up here and swear that it was safer to do it?

Well, it is safer to do it.

How much safer?

It is owing to circumstances.

Well, what circumstances?

It is owing to where the cars were standing, but where these cars were standing it wouldn't have done any damage.

Were there not some cars coupled there that got loose and run down hill and smashed up?

Yes sir, but not where the accident happened.

Well, how did it happen?

They were cut off higher up there.

And it was cut off up there and run down against the other car and caused it to run down hill?

I didn't see them.

You saw the wreck?

Yes sir.

46 R. S. COOKSEY, being sworn, testified as follows:

Direct examination by Mr. COTHRAN:

Where do you live?
At Converse.
Were you there at the time of this accident?
Yes sir.
Where were you standing?
I was standing at the crossing, right at the company's store platform.
You were standing at this crossing (pointing out crossing on photograph)?
Yes sir, I was standing at the edge of the rock wall, at the company's store.
What was your business at that time?
Clerk at the depot.
What was your duty while there?
Well, to get the car numbers and take a record of the cars set in there.
Did you see Mr. Carson that day?
Yes sir.
Where did you first see him?
I first saw him on top of the train when the train first came up.
What did he do—did you see him adjust the switch?
Yes sir.
Did he first adjust the monkey switch?
No sir, he threw the switch on the main line.
And then the monkey switch?
Yes sir.
Then what did he do?
He went to couple the cars.
Were you near him when he adjusted the monkey switch?
Yes sir.
What did he do?
He gave a signal.
To come on back?
Yes sir.
To whom did he give the signal?
To the man on top of the train.
Did the train come on back?
Yes sir.
What did Mr. Carson do then?
Tried to make the first coupling.
On the one stationary or the one moving?
The stationary one.
How far were you from him?
About twenty yards.
Did you see him give any signal?
No sir.

What did he say?
He said, "Come on back."
After he made the first coupling he said, "Come on back"?
Yes sir.
Holler it out loud?
Yes sir.
47 To whom did he say it?
To the man at the top, it looked like.
Did you hear him tell the conductor to hold the train steady until he made the coupling?
No sir.
Couldn't you have heard him say it if he had said it?
Yes sir.
Were you as close to him as you were to Mr. Arwood?
Yes sir, I was closer to him than when he made the first coupling.
After he made the first coupling he went down between the porch and the cars?
Yes sir.
What did he do then?
He went to make the other coupling.
Did you see him trying to affect the other coupling?
Yes sir.
Did he use the lever?
No sir.
He went in between the cars?
Yes sir.
Didn't you hear him say anything more?
I heard him say, "Come on back."
Are you certain it was after he made the first coupling that you heard him say, "Come on back"?
Yes sir.

Cross examination by Mr. McCULLOUGH:

What is your business?
Clerk in the depot.
Where were you standing, with reference to the monkey switch?
I was standing at the crossing above the store platform.
You were standing where?
I was standing there at the rock wall.
Now there is a sharp curve there?
Yes sir.
You say you saw Mr. Carson when he was where?
He was on the train when I first saw him.
After he got on the side track he turned the monkey switch?
That is what he did.
And then he signalled them to come back?
Yes sir.

When he made the first coupling, did he go down there first to see if that coupling was all right?

No sir.

You say the first thing you heard him say, after he had adjusted the monkey switch, was "Come on back"?

Yes sir.

48 You say he first went in between the cars on the side track and the cars that had been cut off to make the first coupling?

Yes sir.

What did he do then?

He went around on the other side and said, "Come on back."

Did the cars stop after he had made the first coupling?

No sir.

Do you swear that?

Yes sir.

Well, tell the court and jury why he said come on back if the cars never stopped. Do you swear that the cars didn't stop after he made the first coupling, and he went around between the cars, and the cars were moving back all the time?

Yes sir.

THOMAS W. WALDROPE, being sworn, testified as follows:

Direct examination by Mr. COTHRAN:

Where do live?

At Union.

Where do you work at Union?

At the cotton mill.

Where were you working in August of this year?

At Converse; at the mill there.

What was your business in the mill?

Weaving.

You were in the weaving department?

Yes sir.

Where were you when Mr. Carson got his arm crushed?

I was at No. 3 company's store at Converse.

Where were you?

On the back platform of the company's store.

(Presenting paper to witness.) Can you point out where you were standing when the accident happened?

Points out place.

Near the north end of the platform?

Yes sir.

Was there any one else with you?

Yes sir.

Who was with you?

Charley Bradley.

The porch is very near the side track?
Yes sir.
I will ask you to tell the jury where you saw Mr. Carson that day?
I saw him make the first coupling—that was where I first saw him. He made the first one all right and then started down to make the second one, and the cars were still moving back, and when he went in there to make the coupling I saw the cars were going to catch him and I started to holler to him, and about that time they caught him.
49 He made the first coupling near the monkey switch?
Yes sir.
And went down between the cars to make the second coupling?
Yes sir.
Before he went between the cars what did he do?
He raised up the lever and it would not work for some reason.
You say it would not work for some reason?
No sir.
What did he do then?
He went in and took hold of it with his hand.
How far were you from him?
About twenty feet.
Was he directly in front of you?
Yes sir.
How far apart were those cars when he made the first coupling?
Ten or twelve feet.
How far apart were they when he went in between the cars to make the second coupling?
Four or five feet.
Was the car he first coupled to the train moving or not?
Yes sir.
How do you know that?
Well, I was looking at him.
You say you started to do what?
I started to tell him to turn loose. I saw him go in between the cars and catch hold of the pin and then it caught his arm.
Was the car moving?
Yes sir.
Were they moving when he started between them?
Yes sir.

Cross examination by Mr. McCULLOUGH:

You staid in one position all the time?
Yes sir.
Do you mean to swear to the jury that all these cars were moving?
Yes sir, I saw all the cars moving that were coupled to the engine.
Do you swear before that jury that you saw Mr. Carson go between

the cars to make the second coupling, and that all the cars attached to the engine were backing all the time?

Yes sir.

When did they first come back?

When he made the first coupling.

Were they backing when he made the first coupling?

Yes sir.

And kept on backing all the time?

Yes sir.

And when he went to make the second coupling they kept on backing?

Yes sir.

Defense closes.

J. L. CARSON, recalled, testified as follows:

Direct examination by Mr. McCULLOUGH:

Mr. Carson, you heard the testimony of Mr. Waldrope and Mr. Cooksey?

Yes sir.

They said that when you went to affect the coupling the cars were coming back all the time—when you tried to affect the second coupling that time?

No sir, they were standing still; the train came to a dead standstill.

Mr. Arwood testified the same as Mr. Cooksey; that he heard you say "Come on back" before you tried to affect the second coupling; is that true or not?

No sir, I didn't give any signal at all.

W. D. McDONALD, recalled, testified as follows:

Direct examination by Mr. McCULLOUGH:

Mr. McDonald, Mr. Arwood, Mr. Cooksey and Mr. Waldrope testified that at the time the second coupling was being effected that the cars were coming back all the time and that there was only one stop made when you came in there, where was that?

It must have been when the first coupling was made.

Do you know that the cars were standing still then?

Yes sir.

And after that you received a signal from Mr. Arwood to come on back?

Yes sir.

You got the signal to come on back?

Yes sir.

You transmitted that to the engineer?

Yes sir.

Cross examination by Mr. COTHRAN:

You got that from Mr. Carson?
No sir, I didn't see him at all.
You would get the signals from Mr. Arwood?
Yes sir.
He was on top of the car?
Yes sir.
You don't know when the first stop was made?
No sir; it must have been when the first coupling was made.
51 You don't know positively?
No sir.
There is a great deal of slack in cars?
Yes sir.
In twenty-one or twenty-two cars there would be a great deal of slack, would there not?
Yes sir.

Re-direct examination by Mr. MCCULLOUGH:

Was this a slack or a stop you were talking about?
A dead stop.

The following rules were offered in evidence, some by the plaintiff and some by the defendants:

General Rules.

D. Persons employed in any service on trains are subject to the rules and special instructions.
E. Employés must render every assistance in their power in carrying out the rules and special instructions.

Movement of trains.

85. A train must not start until the proper signal is given.
101. If a train should part while in motion, trainmen must, if possible, prevent damage to the detached portion. The signals prescribed by the rules 12 (*d*) and 14 (*f*) must be given, and the front portion of the train kept in motion until the detached portion is stopped.
105. Both conductors and enginemen are responsible for the safety of their trains and, under conditions not provided for by the rules, must take every precaution for their protection.

Rules for movement by train orders.

204. * * * Those for a train must be addressed to the conductor and engineman, and also to any one who acts as its pilot. A copy for each person addressed must be supplied by the operator.

Train masters.

269. They are responsible for the organization of train crews and for the maintenance of an adequate force in the train serv-
52 ice. To this end they will appoint brakemen, flagmen, and baggagemen, and will recommend to the superintendent the appointment of conductors.

Master mechanics.

292. They have authority over and are responsible for all ordinary repairs of engines and cars, but for general or extensive repairs they must have special written authority from the superintendent of motive power.

294. They must see that all machinery tools, manufactured appliances, castings, material and supplies received are carefully inspected and are of the requisite kind and quality; that they are properly cared for and issued, and economically used; that the regulations and other necessary precautions for the prevention of fire are fully observed; that smoking is not permitted in shops or shop yards; that employés are punctual in attendance and faithful in the discharge of their duties; that time is not wasted in unnecessary conversation; that visitors are not admitted to the shops without proper authority; that the utmost efficiency and economy is maintained in all of the work under their direction; that an accurate record is kept of the labor employed and the material used in each piece of work; that no work is done in the shops at night or on Sunday unless it is absolutely necessary, and must prohibit lights in the shop after working hours except those required by watchmen.

As to conductors.

367. They will have charge of the trains to which they are assigned and of all persons employed thereon. They are responsible for the safe and proper management of such trains, for the protection and care of passengers, baggage and freight, for a thorough performance of duty by the train employés, and for the observance and enforcement of all rules and orders relative thereto. They will report all viola tions of rules and neglect of duty by the train employés to the superintendent or train master, and in case of gross misconduct may, if necessary, suspend any such employé for the rest of the trip, reporting such action by wire, and holding the train, should safety require it.

53 368. Any failure on the part of conductors to exercise proper control over the movements of their trains, or to report neglect or violence of duty of enginemen, will be taken as proof of inefficiency. At the same time they must treat enginemen with the consideration due to the importance of their duties and to their joint responsibility for the movement and safety of their trains, and must advise with them in all cases of doubt or difficulty.

369. They must see that their subordinates are familiar with their duties, ascertaining the extent of their experience therein and their knowledge of the rules, and must instruct them, if necessary, in the proper performance of their work and caution them as to its risks. Any incompetence which they cannot readily remedy must be promptly reported to the train master.

373. They must see that the train is furnished with all necessary supplies and with the standard train equipment complete, that the enginemen has a full set of signals, and that all requisite train signals are properly displayed.

390. They must see that the brakes are securely applied on all cars left by them on sidings, that the wheels are blocked, if necessary, and where derailing switches are provided, that they are set so as to prevent such cars from obstructing the main track.

391. They must see that hand and lamp signals are carefully and correctly given, and that whistle signals are accurately sounded.

392. They must see that, when switching is to be done by their engine and crews, both the engineman and fireman are on the engine, so as to observe signals from both sides of the train.

401. If their trains are involved in any accident from which claims for personal injury may arise, they must get the names and addresses of all persons thereon, and a statement from each whether any personal injury has been sustained, must make a complete record of such names, addresses and statements and, in case of personal injury, they must be governed by rules in the hand book.

403. Conductors must always be vigilant to foresee, and,
54 as far as possible, to prevent anything which may cause accident or delay to their trains.

Freight service.

The following rules apply to the freight conductors:

465. When their trains are in motion, unless their presence is required elsewhere, their proper place is in the caboose, and they must there maintain such position as will give them a full view of their trains and enable them to see whether they are all right and the men are in proper position and are performing their duties.

478. They must see that one coupling link and two pins are left with each) car equipped with common draw heads which is switched by them at intermediate points, and that the doors of all such cars are shut and securely fastened.

481. In switching at stations and in yards, when it is necessary to move cars that are being loaded or unloaded, they must see that all persons engaged in such work are warned of such movement in time to avoid injury. When cars that have been placed for loading or unloading are so moved, they must be returned as soon as possible to the places where they were found or to places equally convenient.

Enginemen.

500. They must obey the orders of the train master and the road foreman of engines. Within station and yard limits they must obey the orders of the station masters, station agents and yard masters respectively. Within shop and engine house limits they must obey the orders of the foreman. They must obey the orders of their conductors with respect to the general management of their trains and to the station, yard or construction work in which they are engaged.

502. They are jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules; and while they must obey all proper orders by the conductors or others, as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any other person which involves the violation of such rules, or peril to persons or property.

503. When there is no conductor, or when the conductor is disabled, the engineman will have charge of the train and will be governed by the rules for conductors.

505. At all points where there are no switching service, and at other points when necessary, they must assist in making up their trains.

514. Enginemen of passenger and mixed trains must not start from any station without the starting signal prescribed by rule 16 "*a*." Enginemen of other trains must not start without receiving from the conductor the signal prescribed by rule 12, cut "*b*."

523. They must keep a constant and vigilant lookout while running, for obstructions, defects of track and signals, and must frequently look back, especially while rounding curves, to see whether they have the whole train and it is all right.

545. They must see that brakemen who are riding on their engines promptly return to their positions on the train, whenever it is necessary.

Flagmen.

538. Flagmen will report to and receive instructions from the train master. When on duty, they must obey the orders of the conductor.

590. They must obey the signal from the engineman prescribed by the rules, but must never wait for such signal or for orders from the conductor when their trains need protection.

Freight brakemen.

659. Freight brakemen will report to and receive instructions from the train master. When on duty they must obey the orders of the conductor.

662. They must manipulate the brakes, make couplings, switch cars, load and unload freight, throw the switches to be used by their trains, except where switchmen are employed, or in the absence of the switchmen, and perform such other duties in the management and protection of their trains as may be assigned to them by the conductor.

56 663. When their trains are running they must ride on top of them, and in such positions as to be able to control them most effectually and to pass signals the whole length of them.

665. When riding on the engine they must promptly obey the orders of the engineman to return to their positions on the top of the train.

666. When the control of the train *it* dependent wholly or in part on the manual application of the brakes, they must promptly perform this duty at all points where its necessity is apparent, without waiting for a signal from the engineman or directions from the conductor, and under all circumstances they must respond instantly to the engineman's call for manual application of the brakes. They must apply the brakes in such succession as to take up the slack of the train gradually and avoid breaking it in two, must not slide the wheels, and on long grades must release each brake at such intervals as may be necessary to avoid excessive heating of the wheels.

667. They must securely set the brakes of all cars left by them on sidings, block the wheels if necessary, and, where derailing switches are provided, must set them so as to prevent such cars from obstructing the main track. They must leave one coupling link and two pins with each car so left, and must see that their doors are shut and securely fastened.

668. They must be careful to give all hand and lamp signals in a plain and accurate manner.

Station agents.

673. They are in charge of the company's interest at their respective stations, of its buildings, sidings and grounds within the station limits, of the station appliances and equipment, of its accounts and records, of the material and supplies furnished for its work, of all cars at the station except in trains, of the receipt, care, forwarding and delivery of baggage and freight, of the sale of tickets, of the collection of the station revenues, of the remittance or deposit of money received for the company, of such disbursements

57 thereof as may be properly authorized, of all station employés, and of other employés while at the station, so far as relates to their conduct or to the station work. They will also have charge of such other matters as may arise in connection with the station management or may be assigned to them by proper authority. They must report to the superintendent any matter affecting the company's interests.

674. Where there is no yard master, the duties of such position, so far as they exist, devolve upon the station agent, and he will be governed in the discharge of such duties by the rules for yard master.

675. They must make complete daily inspection of the station premises and see that all parts thereof are in safe and proper condition for the use to which they are devoted. Any defects which they cannot remedy they must promptly report to the superintendent.

General regulations.

3. Conductors must read their orders to flagmen, and enginemen must read their orders to firemen.

10. Cars must not be coupled or uncoupled or pins set by hand. For this purpose brakemen will use sticks, which will be furnished them on application, and every brakeman is required to supply himself with one of these sticks, and see that it is long enough to prevent his going between the cars to couple and uncouple them or set pins. Any employé going in between cars while such cars are coupled to the engine, or being so coupled, for the purpose of coupling or uncoupling cars, or to set pins or links, or for any other purpose while the train or cars are in motion, does so at his own risk. Conductors and yard foremen are required to see that trainmen and yard men do not violate these instructions, and they shall require each brakeman on their train to read these instructions in their presence, and whenever these instructions are violated the conductor or yard foreman must be able to establish the fact that the brakeman in fault violated the instructions positively against his orders.

11. Every employé must exercise the utmost caution to
58 avoid injury to himself or to his fellows, especially in the switching of cars, and in all movements of trains, in which work each employé must look after and be responsible for his own safety. Jumping on or off trains or engines in motion, getting between cars in motion to couple or uncouple them, and all similar imprudences are dangerous and in violation of duty. All employés are warned that if they commit these imprudences it will be at their own peril and risk.

12. Every employé is hereby warned that before exposing himself in being on the tracks or grounds of the company, or in working with or being in any manner on or with its cars, engines, machinery, or tools, he must examine, for his own safety, the condition of all machinery, tools, tracks, cars, engines, or whatever he may undertake to work upon or with, before he makes use of or exposes himself on or with the same, so as to ascertain, as far as he reasonably can, their condition and soundness; and he is required to promptly report either to the superintendent, or to the agent who may be his immediate superior officer, any defect in any track, machinery, tools or property of the company affecting the safety of any one in using or operating upon or with the same. The object of this

rule is to protect employés from suffering personal injury from any cause. While the company will be responsible to each one for the discharge of all its duties and obligations to him, and for any fault and neglect of its own, or of its board of directors or general officers, which are the approximate cause of the injury, yet it will not be responsible to him for the consequences of his own fault or neglect, or that of any other employees of the company, whether they or any of them are superior to him in authority, as conductor, foreman, or otherwise; it being the right and duty of every employé, under all circumstances, to take sufficient time before exposing himself, to make such examinations as are here required, and refuse to obey any order which would expose him to danger. Every case of personal injury must be promptly reported.

59 Duty of yard masters.

They must see that all yard structures, and signals, and other appliances are in safe and proper condition, and must report any defect therein, which they can not remedy, to the superintendent.

Judge's Charge.

Mr. Foreman and Gentlemen of the Jury: This is an action brought by the plaintiff here, J. L. Carson, against the Southern Railway Company and J. C. Arwood and J. D. Miller, to recover fifteen thousand dollars damages. The plaintiff alleges in his complaint that J. C. Arwood and J. D. Miller were in the employment of the Southern Railway Company; that Mr. Arwood was employed as conductor and Mr. Miller as engineer, and that he was employed by the railroad company as flagman. He alleges that on the 16th day of August, 1902, at Converse, South Carolina, he was assigned to the duties of brakeman. He alleges that they took him from his position of flagman and assigned him brakeman at Converse, South Carolina. And at Converse on that day he alleges that his arm was mashed while he was trying to couple an automatic coupling, by reason of a collision of a freight train belonging to the Southern Railway Company. And he alleges that the servants of the railway company, the conductor and engineer, were guilty of carelessness and negligence, and that the injury done to him was done by the joint, concurrent, wanton, carelessness and negligence of the defendants. You will have this complaint before you, and you can read it over. In section six it is set out fully that the railroad company is required to furnish suitable appliances for the employees, and to keep those appliances in suitable repair. He states that this was an automatic coupling, that there were not any suitable appliances for him to work with, and that he was directed by the conductor to couple these cars; that by reason of the automatic coupling being out of fix, caused him to have to go between the cars.

He alleges that the coupling was out of fix, and that he had
60 to go in between the cars to make the coupling. He says that he notified the parties in charge of the train, to hold the train steady, that he was going in between there to couple the cars, and that they came back on him with the train without any notice. He alleges that it was the joint, concurrent, wanton negligence and carelessness of the defendants, and that his injury was done by their wanton carelessness. He says that he is thirty-five years of age and that he has lost and suffered considerable pain by reason of the said collision; and that he has a wife and four children dependent on him for support; and for that reason he is suing for fifteen thousand dollars damages. He alleges that the train backed on him wantonly, carelessly, and negligently; and that by reason of their backing the train they mashed off his arm; and that he told them to wait until he gave them the signal.

The defendants come into court and deny that he was injured by the joint and concurrent negligence of themselves. They deny that he was injured by the joint, concurrent, wanton carelessness and negligence at all. They deny that they moved the train on him. They allege that if he was injured at all, that he contributed to the negligence that caused his injury. They deny everything that he sets up as their negligence. They deny that they were negligent at all. They set up further, that by his carelessness he contributed to the injury. These are pleadings as made up in the case.

You heard the testimony and that is for you entirely. You are the sole judges. You take the law from me as I give it to you, and if I commit an error there is a tribunal to correct me. My duty is to give you the law, and if I make a mistake, I can be corrected. You take the law as I give it to you, and then you find the facts in the case, and apply the law as I give it to you. Now, was the plaintiff here injured by carelessness and negligence of the railroad company, or was he injured by the willful, joint, concurrent, wanton negligence and carelessness of the railroad company and the
61 conductor and engineer? If you conclude that *their* injury was due to their carelessness, and that the plaintiff did not contribute to the direct and proximate cause of the injury, then your verdict will be for the plaintiff, for such damages as you think he sustained. If you think the plaintiff was injured by the joint and concurrent negligence and carelessness of the defendants, and that was the direct and proximate cause of the injury, and that he did not by his own act contribute to the direct and proximate cause of the injury, your verdict will be for the plaintiff; and if you reach the conclusion that it was the joint, concurrent, negligence and carelessness of the defendants, and that it was the willful, joint, concurrent, wanton negligence and carelessness of the defendants; then you could give such damages in the way of punishment as you see proper. That is, you could give such punitive damages as you see proper. Now, I charge you as a matter of law, that if the plaintiff in anyway contributed to the direct and proximate cause of

the injury, your verdict would be for the defendants. The law does not allow a man to come into court and recover if he by his own act contributes to the cause of the injury. But if the plaintiff was injured and he did not contribute to the direct and proximate cause of the injury, then your verdict would be for the plaintiff in proportion to the injury you think he sustained. If the plaintiff by his own act did not contribute to the direct and proximate cause of the injury, but the defendants here were guilty of negligence and carelessness, and that was the direct and proximate cause of the injury, and in addition to that, that the defendants willfully, wantonly, carelessly and negligently injured him, and that was the direct and proximate cause of the injury, and that he did not by his own act contribute to the direct and proximate cause of the injury, then you can give in the way of punishment and punitive damages what you think proper.

Now, negligence is what no ordinary man would do under similar circumstances. I charge you as a matter of law, that no railroad or common carrier can relieve itself by entering into a con-
62 tract. The law does not allow any contract made between the railroad company and the employés to relieve the railroad of negligence. I charge you that as a matter of law, that a railroad company is allowed to make rules to govern the employés, but they are not to conflict with the laws of the land. By an act of Congress, the United States Government requires any railroad company engaged in running cars from one State to another, engaged in what is known as inter-state commerce, to put on automatic coupling-. They are to be equipped with automatic couplers—coupling automatically by impact; which can be coupled and uncoupled without the necessity of men going between the ends of the cars. The law requires them to keep suitable appliances for running such trains, and to keep them in good condition. I charge you that any railroad engaged in running trains from State to State, under the law, they are required to have automatic coupling. And I charge you further, that they are required to keep these appliances in good order; that is in safe and suitable order.

The presiding judge here took up the requests to charge of both plaintiffs and defendants. He charged for the plaintiff, requests: I, II, III, VI, VII, VIII, XI, XIV, XXI. Requests IV, IX, XV, XVIII, XIX, XX were withdrawn: which are correctly set forth in the exceptions of defendants. The other requests of the plaintiff, with the remarks of the presiding judge, are as follows:

V. "As a general rule the servant has no claim on the master for damages for an injury received by voluntarily assuming to do something which the master did not employ him to do; yet, in the case of emergencies, he may of his own volition step outside the line of his usual duties, and if this departure is only such as the necessities of the case fairly and reasonably call for, keeping in view the character of the work he is called upon to do, it will not of itself defeat a claim of damage in case he is injured. Whether he is guilty of

negligence is a question for the jury, and his conduct must be tried in the light of all the surrounding circumstances."

I charge you that.

63 X. "I charge you that the rule of a railroad company with reference to coupling and uncoupling cars while attached to an engine or in motion, except with a pin and stick, applies only to those couplings that should be affected in such manner and has no application to those cars which are to be coupled without the use of a pin and stick."

I refuse to charge.

XII. "I charge you that the rule of a railroad company forbidding the coupling or uncoupling of cars except with a pin and stick, is no longer in force if the company adopts other appliances for the purpose of coupling and uncoupling cars, or if it is its duty under the law to adopt other appliances."

I have charged you that already.

XIII. "The fact that a servant violates a rule of a master is not of itself negligence, and the jury must under the circumstances of each particular case say whether or not upon the occasion in question the servant was justified under the circumstances in violating the said rule, and, if not justifiable, whether or not the violation of said rule was the proximate cause of the injury."

I charge you that.

XVI. "I charge you in this case that even though you should conclude that it was negligence in the plaintiff to go between the cars on the occasion alleged, yet I charge you that if, notwithstanding such negligence the railway company could have avoided its effect, and prevented injury to him, by the observance of ordinary care, and the railway company backed the said engine without any signal from the plaintiff, or warning to him, and that such an act under all the circumstances was negligence and the proximate cause of the injury, then I charge you that the negligence of the plaintiff, if any, in going between the cars in the first instance would not prevent his recovery in this case."

I charge you that, with this modification, unless you are satisfied that the plaintiff in some way contributed to the proximate cause of the injury.

64 XVII. "When the negligence of the person inflicting the injury is subsequent to and independent of the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effect and prevent injuring him, there is no contributory negligence because the fault of the injured party becomes remote in the chain of causation." Bodie against Railway Company, 61 S. C., 486.

I charge you that in connection with what I have already said, that if the plaintiff in any manner contributed to the direct and proximate cause of the injury, then the plaintiff would not be entitled to recover.

The presiding judge refused the request to charge of defendants numbered I, III, IV, V, VI, X, XVI, XIX, XX which are correctly set forth in the defendants' exceptions; he modified its requests numbered II, VII, VIII, IX, XI, XVIII, which with the modifications, are correctly set forth in the defendants' exceptions. The other request, of defendants, with the remarks of the presiding judges are as follows:

XII. "If the plaintiff in any of the circumstances attending the injury was guilty of negligence which caused the injury, he is not entitled to any damage."

I charge you that.

XIII. "Even if the defendants or any of them were guilty of negligence under the circumstances attending the injury, still the plaintiff cannot recover damages if he himself was guilty on account of carelessness which contributed to the proximate cause of the injury."

I charge you that.

XIV. "Contributory negligence to any extent will alway defeat a recovery, provided it is of the same character as that of the defendant is required to be, viz: a proximate cause of the injury."

I charge you that.

XV. "There is no difference in law between the character
65 or quality of the negligence of defendant which will fix as liability upon it, and that of the plaintiff, which will charge him with contributory negligence."

I charge you that.

XVII. "The constitutional provisions in reference to the servant's knowledge of defective machinery, applies only to cases where the injury is caused directly by the defective condition of such machinery. It does not apply when the injury was caused by some other agency individually connected with such defective machinery."

I charge you that.

Continuing the presiding judge charged the jury:

This is about all the law in the case. The facts are for you. If you find for the plaintiff, the form of your verdict will be, we find for the plaintiff so many dollars and sign your name as foreman; and if you find for the defendants, We find for the defendants, and sign your name as foreman. If you find for the plaintiff against two of the defendants say, We find for the plaintiff against the two defendants so many dollars, and sign your name as foreman. If you find for the plaintiff against the Southern Railway Company and not against Arwood and Miller, say, We find for the plaintiff so many dollars against the Southern Railway Company and sign your name as foreman; or if you find for the plaintiff against the Southern Railway Company and Mr. Arwood, say, We find for the plaintiff against the Southern Railway Company and J. C. Arwood so much, and sign your name as foreman; or if you find for the plaintiff against the Southern Railway Company and Mr. Miller say, We find so much for the plaintiff against the Southern Railway and

J. D. Miller, and sign your name as foreman. If you find for the plaintiff against J. C. Arwood and J. D. Miller and not against the Southern Railway Company, say, We find so much for the plaintiff against J. C. Arwood and J. D. Miller and sign your name as foreman; and if you find for the defendants, say, We find for the defendants, and sign your name as foreman.

Take the record.

66 The jury returned the following verdict:

"We find for plaintiff against Southern Railway Company, ($6,500) six thousand and five hundred dollars.

W. M. RIDGEWAY, *Foreman.*"

Motion for New Trial.

The defendant, Southern Railway Company, made a motion for a new trial, on the minutes of the court, upon the grounds stated in the order refusing the same, as follows:

Order Refusing New Trial.

(Title.)

The defendant, Southern Railway Company, having made a motion for a new trial, upon the minutes, in the above stated case, upon the following grounds:

1. The verdict in favor of the defendants J. C. Arwood and J. D. Miller, conductor and engineer, respectively, has established the fact that neither of them was negligent in the circumstances attending the injury to the plaintiff. No responsibility therefore attaches to the railway company, their employer, for any act committed by them or either of them. The allegations of, and the evidence tending to show negligence on the part of the said servants, or either of them, in backing the cars, after notice from plaintiff to hold them steady, without signal notice or warning, *is* out of the case.

2. The defect in the coupler was not the proximate cause of the plaintiff's injury.

3. The injury was the direct result of the plaintiff's negligence.

4. The plaintiff was guilty of contributory negligence, which was a proximate cause of the injury.

5. The plaintiff knew of the defective coupler before he went in between the cars, and this defect not having been the direct cause of his injury, he assumed the risk, and was guilty of contributory negligence in making the attempt.

67 6. The plaintiff's stipulation and the rules forbid his going in between the cars, while an engine was attached to them,

for the purpose of coupling or uncoupling, or adjusting pins; he violated both, and was guilty of contributory negligence.

7. The cause of action was joint and concurrent negligence on the part of all the defendants. The verdict conclusively negatives this allegation.

8. The damages allowed are excessive.

After argument and consideration thereof: It is ordered that the motion be, and the same is hereby, over-ruled.

R. C. WATTS,
Presiding Judge.

Greenville, S. C., Nov. 27, 1902.

Motion in Arrest of Judgment.

The defendant then made a motion in arrest of judgment upon the grounds stated in the order over-ruling the same, as follows:

Order Refusing Motion in Arrest of Judgment.

(Title.)

The defendant, Southern Railway Company, having made a motion in arrest of judgment in the above stated case, upon the following grounds:

1. The alleged cause of action was the joint and concurrent negligence of the defendants. The verdict in favor of the conductor and engineer conclusively settles this question against the plaintiff.

2. The verdict is inconsistent with the plaintiff's cause of action.

After argument and consideration thereof: It is ordered that the motion be, and the same is hereby, refused.

R. C. WATTS,
Presiding Judge.

Greenville, S. C., Nov. 27, 1902.

68 *Motion for Judgment.*

The defendant then made a motion that the court direct that judgment be entered in its favor upon the grounds stated in the order of the presiding judge over-ruling said motion, as follows:

Order Over-ruling Motion for Judgment.

(Title.)

The defendant, Southern Railway Company, having made a motion that the court direct that the judgment in this case be entered in its favor against the plaintiff upon the following grounds:

1. The alleged cause of action was the joint and concurrent negligence of the defendants. The verdict in favor of the conductor and engineer conclusively determines that the injury was so caused.

2. The complaint and the testimony both showing that the alleged negligence of the railway company in the matter of the defective coupling was not the proximate cause of the injury, there is nothing left in the case except the alleged negligence in backing the train without signal notice or warning. This is shown in like manner to have been the act of the conductor or engineer, or both. The jury having found that neither of these servants was negligent in that or any other particular, no responsibility attaches to the railway company, their employer, for any act committed by them or by either of them. When the act of the servant is determined not to have been negligent, the same act, treated as the act of the master through the instrumentality of the servant, cannot be so.

3. In an action against master and servant for an injury caused by the alleged negligence of the servants, and a verdict is rendered in favor of the servants and against the master, the verdict in favor of the servants precludes a recovery against the master, and judgment should be rendered in favor of the master.

After argument and consideration thereof: It is ordered
69 that the motion be, and the same is hereby, refused.

R. C. WATTS.
Presiding Judge.

Greenville, S. C., Nov. 27, 1902.

Notice of Appeal.

(Title.)

To Messrs. McCullough & McSwain, attorneys for plaintiff:

Take notice: that the defendant, Southern Railway Company, intends to, and does hereby, appeal to the supreme court from the judgment entered or to be entered in the above stated case pursuant to verdict rendered therein at the November term of the court of common pleas, State and county aforesaid; from the order overruling demurrer to the complaint; from the order refusing motion for non-suit; from the order refusing to enter judgment in favor of said defendant upon the verdict; from the order refusing motion in arrest of judgment; from the order refusing motion for new trial; and from all other proceedings in said cause, upon exceptions and grounds of appeal hereafter to be served upon you.

T. P. COTHRAN,
Attorney for Defendant.

Greenville, S. C., Dec. 6th, 1902.

Exceptions.

The defendant, Southern Railway Company, appeals to the supreme court from the judgment entered in this case, and will move the court to reverse the same upon the following exceptions and grounds of appeal. The appeal is also from the order referred to in the notice of appeal.

70 I.

The Demurrer.

1. The error of the presiding judge in over-ruling the demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

2. Error of the presiding judge in not sustaining the first ground of demurrer to the complaint, which was as follows:

"The complaint does not show negligence on the part of the defendants, or either of them."

3. Error of the presiding judge in not sustaining the second ground of demurrer to the complaint, which was as follows:

"The complaint shows contributory negligence on the part of the plaintiff.

4. Error of the presiding judge in not sustaining the third ground of demurrer to the complaint, which was as follows;

"So far as the allegation of negligence in regard to the absence of the cotter pin (defective machinery appliances) is concerned, the complaint does not show that the injury complained of resulted therefrom as a proximate cause thereof."

5. Error of the presiding judge in not sustaining the fourth ground of demurrer to the complaint, which was as follows:

"So far as the allegation of negligence in regard to the backing of the engine without signal, warning or notice, is concerned, the complaint shows that this was the act of the engineer or conductor or both; it was therefore the negligence (if any at all) of the servant or servants of the railway company, for which the railway company in a proper action. may be held responsible. This action, however, is based upon an allegation of joint and concurrent tort on the part of master and servant. To constitute such a tort, it must appear that

71 the master and servant each had a direct share therein, that they each actually participated therein. The imputed liability of the master for the wrong of the servant, in which the master has not participated and which he neither authorized nor ratified, does not in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort.

6. Error of the presiding judge in not sustaining the fifth ground of the demurrer to the complaint, which was as follows:

"The complaint alleges an act of negligence on the part of the master (failure to provide suitable appliances), and an act of negligence on the part of the servant or servants (backing the engine without notice, signal or warning). It does not charge any participation by either in the negligence of the other, and therefore does not present a case of joint and concurrent tort."

7. Error of the presiding judge in not sustaining the sixth ground of the demurrer to the complaint, which was — follows:

"The principles contended for in specification IV are particularly applicable to the charge of joint, willful tort. The master cannot be held liable jointly with the servant for the wilful tort of the servant, unless the master authorized or ratified it."

8. Error of the presiding judge in not sustaining the seventh ground of the demurrer to the complaint, which was as follows:

"The complaint alleges that the acts of the defendants complained of were both negligent and willful. This is an impossibility. Negligence and willfulness are the opposites of each other."

II.

The Evidence.

9. Error of the presiding judge in sustaining plaintiff's objection to the following question asked the plaintiff by defendants' counsel:

"Don't you know that if you had reported that (the fact
72 that the pin was out of order) to the conductor this accident would not have occurred?"

The question was competent and relevant. It was plaintiff's duty, under rule 12, to report said defect, and his knowledge of the rule and its purpose had material bearing upon defendants' plea of contributory negligence.

III.

Motion for Non-suit.

10. Error of the presiding judge in over-ruling the first ground of defendants' motion for a non-suit, as follows:

I. The alleged negligence in regard to the absence of the cotter pin (defective machinery or appliances) is not shown by any testimony tending to establish that fact, to have been a proximate cause of the injury complained of.

11. Error of the *the* presiding judge in over-ruling the second ground of defendants' motion for a non-suit, as follows:

II. The testimony shows that the proximate cause of the injury was the plaintiff's voluntary and unnecessary exposure of his person to the moving cars.

12. Error of the presiding judge in over-ruling the third ground of defendant's motion for a non-suit, as follows:

III. The complaint alleges the plaintiff's injuries were caused by the joint and concurrent tort of the defendants. The evidence does not tend to sustain this allegation. On the contrary, if it tends to show any actionable negligence, it is the negligence of either the engineer or conductor, for which in a proper action the defendant company may be held liable, but which does not make out a case of joint and concurrent tort.

13. Error of the presiding judge in over-ruling the fourth ground of the defendant's motion for a non-suit, as follows:

IV. The plaintiff having alleged a joint and concurrent tort of all the defendants, the defendant, Southern Railway Company, has been deprived of the privilege of removing this cause to the United States court. He should be required to prove the facts
73 alleged. To allow him to proceed in the State court without some evidence of this fact would deprive the defendant of a substantial right guaranteed by the Constitution of the United States.

14. Error of the presiding judge in over-ruling the fifth ground of the defendant's motion for a non-suit, as follows:

To allow the plaintiff, after alleging a joint and concurrent tort by the railway company and its servants, to recover without evidence of such joint and concurrent tort, but simply on evidence of a negligent act of the servant in which the master did not participate and which he neither authorized nor ratified, would deprive the defendant railway company of its property without due process of law, contrary to amendment XIV, Constitution of the United States, for this reason; it would deprive said company of the right of reimbursement from the defaulting servant, which would otherwise exist.

15. Error of the presiding judge in overruling the sixth ground of the defendants' motion for a non-suit, as follows:

The defendant company is not liable in punitive damages for the willful tort of one of its servants. To hold otherwise would deprive said company of its property without due process of law, contrary to the constitution of South Carolina, and art. XIV of the amendment to the Constitution of the United States.

16. Error of the presiding judge in overruling the seventh ground of the defendant's motion for a non-suit, as follows:

Even if the evidence tends to show an act of negligence on the part of the master (defective appliance) and an act of negligence on the part of the servant or servants (backing the train without notice, etc.) it does not tend to show any participation by either in the act of the other, and therefore does not present a case of joint and concurrent tort.

17. Error of the presiding judge in overruling the eight- ground of the defendant's motion for non-suit, as follows:

74 The testimony does not tend to show any negligence, as alleged, on the part of the engineer, and even if it shows neg-

ligence as alleged on the part of the company, the action being based upon an alleged joint and concurrent tort of the defendants, it must for this reason fail.

18. Error of the presiding judge in overruling the ninth ground of the defendant's motion for a non-suit, as follows:

The testimony does not tend to show any negligence on the part of the engineer.

19. Error of the presiding judge in overruling the tenth ground of the defendant's motion for a non-suit, as follows:

The evidence shows that the defect in the coupler was known by the plaintiff when he attempted to go in between the cars.

20. Error of the presiding judge in holding: "I am bound by the decision of the supreme court of this State, and I will overrule the motion for a non-suit."

IV.

The Judge's Charge.

21. Error of the presiding judge in charging the jury as follows: "The law requires them (railroads) to keep suitable appliances for running such trains and to keep them in good condition. I charge you that any railroad engaged in running trains from State to State, under the law they are required to have automatic coupling, and I charge you further that they are required to keep these appliances in good order, that is, in safe and suitable order." The error consisting in this: (1) The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in order. The charge of the judge imposes this duty absolutely upon the railway company; practically making it a guarantor of the safe and suitable condition of the coupling apparatus. (2) The car upon which the defective coupler was, is shown by the testimony to
75 have been an empty car on the side track, not used to move interstate commerce. The act of Congress therefore did not apply to it. [This subdivision is an amendment to the exceptions, and was allowed by respondent upon condition that it be accompanied with the statement that the point was not raised before the circuit judge that the act of Congress did not apply to the cars on side track.]

22. Error of the presiding judge in charging the jury as follows, (the same being No. 1 of the plaintiff's requests):

"By act of Congress it is provided that, 'on and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce to haul or to permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' I charge that if you believe the defendant railway company was a common carrier engaged in interstate com-

merce, and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing the plaintiff's injury, and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence on the part of the railway company, which negligence continued up to the very moment of the collision, if you believe there was such a collision and injury in consequence thereof; and if you believe that such negligence was the proximate cause of such injury your verdict should be for the plaintiff.

"The rule of the defendant railway company forbidding employés going between cars for the purpose of coupling or uncoupling them may be waived by it; I charge you that the conductor is the representative of the railway company, and if said company fails to furnish appliances to brakemen by means of which they may effect said coupling without going between the cars, or furnish them appliances which make it necessary for them to go between
76 the cars to perform the work required of them and without objection, then it is for you to say whether or not such conduct on the part of the railway company amounts to a waiver of the said rule, and if you do find that it amounts to waiver, then I charge you that in such a case that the railway company cannot invoke the said rule in its behalf.

The errors consisting in: (*a*) The act of Congress applies only when the railway company fails to use cars equipped with automatic couplers. It does not apply where the railway company has equipped its cars with such couplers, one of which is temporarily out of repair. The complainant alleges, and the plaintiff's evidence shows, that the cars were equipped with automatic couplers, but that one of them was temporarily out of repair—that it could have been repaired in two minutes. The question therefore was whether the railway company had violated its duty to exercise ordinary care in keeping the coupler in repair, and not whether it had complied with the act of Congress. The latter had no application to the case.

(*b.*) It was error to charge that the failure to provide automatic couplers was negligence, which continued up to the very moment of the collision, for the reason that rule 12 made it the duty of the plaintiff to examine the coupler, and if defective report such fact immediately. The plaintiff admitted that he knew it was defective before he attempted to make the coupling.

(*c.*) The act of Congress requires that the cars be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. It does not require that they be so arranged as to obviate the necessity of men going between the ends of the cars for the purpose of adjusting the knuckles for a coupling. The charge of the judge stamped it as negligence if the plaintiff in order to make a coupling or to adjust the knuckles had to go between the ends of the cars.

23. Error of the presiding judge in charging the jury as follows, (the same being No. 2 of the plaintiff's requests):

" I charge you that it was the duty of the railway company
77 in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also see that the same were kept in proper repair, and if this duty was negligently performed, and the plaintiff sustained any injury thereby, the railway company is responsible in damages.

" I charge you that, provided the negligence of the railway company was the direct and proximate cause of the injury, and that the plaintiff did not contribute to the direct and proximate cause of the injury,"

The error consisting in this: The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in repair. The charge imposes this duty absolutely upon the railway company, practically making it a guarantor of the safe and suitable condition of the coupling apparatus.

24. Error of the *the* presiding judge in charging the jury as follows, (the same being No. 3 of plaintiff's requests):

" I charge you that the risk which a railway employé assumes when he enters the employ of a railway company does not extend to such risks as he is exposed to by reason of defective machinery or appliances."

The error consisting in this: An employé assumes all risks except those which flow from the master's negligence in his duty in furnishing safe machinery and keeping the same in repair. The charge was erroneous in not so stating.

25. Error of the presiding judge in charging the jury as follows, (the same being No. 6 of plaintiff's requests):

" I charge you that contributory negligence on the part of the servant by using appliances obviously defective, furnished by a railway company, is no longer of force in South Carolina under the constitution of 1895."

The error consisting in this: The defendant contended that under rule 12 it was the duty of the plaintiff to examine the coupler before attempting to effect the coupling and to report any defect therein immediately. The charge eliminated this defense.

26. Error of the presiding judge in charging the jury as
78 follows, (the same being No. 7 of plaintiff's requests):

" The fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to do the work required of him and he is, therefore, not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor."

The error consisting in this: (*a*) It is a charge upon the facts, in violation of the constitution, art. V, sec. 26. (*b*) It erroneously assumes that it was the conductor's duty to inspect the coupling. (*c*) It excludes from the jury enquiry as to the manner in which the

plaintiff may have done the work. (*d*) Under rule 12 it was plaintiff's duty to examine the coupler and report defects immediately. (*e*) It relieves the plaintiff from the obligation to exercise ordinary care in avoiding danger. (*f*) It erroneously declares that no matter what the conditions are, whether known to the conductor or not, the plaintiff may blindly go ahead and do what he is told to do. (*g*) It states an erroneous principle of law. (*h*) It destroys the defence of contributory negligence and of sole negligence of the plaintiff.

27. Error of the presiding judge in charging the jury as follows, (the same being No. 8 of the plaintiff's requests):

"I charge you that a rule forbidding railway employés going between railway cars in motion, for the purpose of coupling or uncoupling them, or where attached to an engine, within itself is a reasonable requirement, but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and if it fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done and in the performance of which said rule is violated."

The error consisting in this: The rule prohibits the brakeman from going between the cars while coupling or uncoupling them, either (1) while the cars are in motion, or (2) while an engine is attached to them. The charge declares that
79 when the brakeman is injured while violating this rule, in either particular, the company can not invoke the rule in its defense unless it has provided other means for the service which renders it unnecessary for the brakeman to go between the cars. In this error is assigned. As applied to (1) it means either that the company must stop the cars, or that it must provide means for the brakeman to make the coupling without going between the cars while they are in motion. If the former, the means were at hand, all that was necessary was a word from the brakeman. If the latter, it presents the anomaly of requiring the company to furnish the means of performing the service in a way prohibited by it. As applied to (2) the same objections apply *mutatis mutandis*. The charge is erroneous for another reason: The plaintiff had stipulated in form 607 that he would not violate this rule and would not obey any order to that effect.

And for the further reason: The conditions which made it apparently necessary for the plaintiff to violate the rule may have been brought about by the negligence of a fellow-servant of the plaintiff.

28. Error of the presiding judge in charging the jury as follows, (the same being No. 11 of the plaintiff's requests):

"I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine, or in motion, has no application to a

case where the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling."

The error consisting in this: It should have been left to the jury to say whether or not the plaintiff had obligated himself, under rule 10 and form 607, to supply himself with a stick, even if it was not the duty of the court to so construe the rule and form, which defendant claims.

29. Error of the presiding judge in charging the jury as follows, (the same being No. 14 of the plaintiff's requests):

"If the jury find that the rule forbidding the going between the cars in motion or when attached to an engine, and forbid-
80 ding the setting of pins and links except with a stick, was adopted by defendant railway company, when a method of coupling cars prevailed by the use of a pin and link; and if the jury find that the said method of coupling cars has been superseded by a method whereby no pins need be set or pins and links need be used, then it is for the jury to say whether or not said rule was at the time of the injury complained of in force and whether or not plaintiff was then bound by the same."

The error consisting in this: No matter what system may have been adopted, the danger of going between the cars while making a coupling was great, and the company had the right to provide by rule and contract against it. The charge makes this right depend upon the continuance of the link and pin method of coupling.

30. Error of the presiding judge in charging the jury as follows, (the same being No. 21 of the plaintiff's requests to charge):

"Notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge you that if the proof fails to show such joint and concurrent negligence on the part of all the defendants, yet shows negligence on the part of one or more of the defendants, which negligence resulted in injury to plaintiff as the sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence."

The error consisting in this: (*a*) By the simple allegation of joint and concurrent tort the defendant, Southern Railway Company, a foreign corporation, has been deprived of the right to remove the cause to the Federal court. The plaintiff should prove the allegations of his complaint. To allow a recovery against one only of several alleged joint tort-feasors put it in the power of the jury to do as they did, find against the railway company and in favor of the servants whose negligence is alleged to have caused the injury. The defendant railway company is thus deprived of a substantial right, that of removal, guaranteed by the Constitution and laws of the United States.

(*b.*) A plaintiff has no right to come into court upon one
81 alleged cause of action, for instance, a joint and concurrent tort, and recover upon proof of a several tort.

31. Error of the presiding judge in refusing the defendants' first request to charge, as follows:

"The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant, Southern Railway Company, a foreign corporation, has been deprived of the right, where the tort was not joint and concurrent, to remove this cause to the United States court. To sustain this action the plaintiff must therefore prove that the acts complained of were the joint and concurrent negligence and tort of the railway company and at least one of the other defendants."

Said request contained a correct principle of law applicable to the case.

32. Error of the presiding judge in modifying the defendants' second request to charge, which was as follows:

"The negligence of a servant, for which, and on which account only, the master is liable, is not the joint and concurrent negligence of the master and servant."

The modification was as follows: "I charge you that with this modification, unless the servant represents the master so that his acts will bind him and that you find that the servants of the company were negligent."

The error consisted in this: The request contained a correct principle of law applicable to the case. The modification emasculated the request. It was error to hold that where the servant represents the master, so that his acts will bind him, the negligence of the servant makes out a case of joint and concurrent negligence on the part of both master and servant.

33. Error of the presiding judge in refusing the defendants' third request to charge, which was as follows:

"To constitute a joint and concurrent tort on the part of master and servant, it must appear that each had a direct share in such tort, that each actively participated therein. The imputed liability of the master for the wrong of the servant, in which the mas-
82 ter has not participated, and which he neither authorized nor ratified, does not, in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort."

Said request contained a correct principle of law applicable to the case.

34. Error of the presiding judge in refusing the defendants' fourth request to charge, which was as follows:

"To allow the plaintiff, after alleging a joint and concurrent tort, by a foreign corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort would deprive such corporation of the right of removal to the United States court, a right guaranteed by the Constitution and laws of the United States, and which would exist were the tort several and not joint and concurrent."

Said request contained a correct principle of law applicable to the case.

35. Error of the presiding judge in refusing the defendants' fifth request to charge, which was as follows:

"To allow the plaintiff, after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such servant or servants, would deprive the railway company of its property without due process of law, contrary to amendment XIV, Constitution of United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant or servants, which would exist were the tort not joint and concurrent, but simply the wrong of the servant or servants for which the company may be liable."

Such request contained a correct principle of law applicable to the case.

36. Error of the presiding judge, in refusing the defendants' sixth request to charge, which was as follows:

"Even if the railway company was negligent in the matter of the alleged defective coupling, and the servant or servants were negligent in the matter of backing the train without signal, &c.,
83 they could not be held jointly liable for the combined results of their acts, if they acted independently in producing the injury and neither participated in the several act of the other."

Such request contained a correct principle of law applicable to the case.

37. Error of the presiding judge in modifying the defendants' seventh request to charge. The request was as follows:

"If the sole proximate cause of the plaintiff's injury was the negligence of the engineer, the jury must find for the defendant railway company; for an engineer or brakeman or flagman upon the same train while employed in the duties usually pertaining to their respective positions are fellow servants. A master is not liable to a servant for injuries received in consequence of the negligence of a fellow servant."

The modification was as follows:

"I charge you that, with this modification: If the plaintiff was not performing the ordinary duties for which he was employed, he does not assume the risk of negligence of fellow servants.

The error consisting in this: The request contained a correct proposition of law applicable to the case. Inasmuch as the evidence showed that the ordinary duties for which the plaintiff was EMPLOYED were those of a flagman, and that he was PRO TEMPORE performing not those duties but those of a brakeman; the modification was calculated to mislead the jury. Although the plaintiff may have been EMPLOYED AS A FLAGMAN, yet if he for the day had undertaken the duties of a brakeman the rule of fellow-servants would apply.

38. Error of the presiding judge in modifying the defendants' eighth request to charge.

The request was as follows: "If the railway company furnished the plaintiff a rule book with the following rule:

"Cars must not be coupled or uncoupled or pins set by hand. For this purpose brakemen will use sticks which will be furnished them on application, and every brakeman is required to
84 supply himself with one of these sticks, and see that it is long enough to prevent his going between the cars to couple or uncouple them or to set pins. Any employé going in between cars while such cars are coupled to the engine or being so coupled, for the purpose of coupling or uncoupling cars, or to set pins or links, or for any other purpose while the train or cars are in motion, does so at his own risk.

"And if the plaintiff violated this rule, and such violation was a proximate cause of his injury or contributed thereto with the negligence of the defendants as a proximate cause thereof, he is not entitled to any damage."

The modification was as follows: "I charge you that with this modification: Provided the rule is not contrary to law; has not been waived by defendant; and the violation of the same was negligence and the proximate cause of the injury."

The error consisted in this: (*a*) The court, not the jury, should have passed upon the question whether or not the rule was contrary to law. (*b*) The negligence of the plaintiff need not be the proximate cause of the injury; it will relieve the defendant if it be a proximate cause contributing with the negligence of the defendant.

39. Error of the presiding judge in modifying the defendants' ninth request to charge. The request was as follows:

"If the railway company furnished the plaintiff with a rule book containing a rule warning him that going between cars in motion to couple or uncouple them was dangerous and violation of duty, and if they do so it will be at their own risk; and if the plaintiff violated this rule and such violation was a proximate cause of his injury or contributed thereto with the negligence of the defendant as a proximate cause thereof, the plaintiff is not entitled to any damage."

The modification was as follows: "I charge you that with the same modification as above."

The error consisted in this: (*a*) The court, not the jury,
85 should have passed upon the question whether or not the rule was contrary to law. (*b*) The negligence of the plaintiff need not be the proximate cause of the injury; it will relieve the defendant if it be a proximate cause, contributing with the negligence of the defendant.

40. Error of the presiding judge in refusing the defendants' tenth request to charge, which was as follows:

"If the railway company furnish the plaintiff with a rule book, containing a rule requiring him, before exposing himself in working

with the cars, to examine for his own safety the condition of such cars, or whatever he may undertake to work on or with, and to promptly report to his immediate superior officer any defect therein affecting the safety of any one using or operating upon or with the same; and if the plaintiff violated such rule, and such violation was the proximate cause of the injury or contributed thereto with the negligence of the defendants as a proximate cause thereof, the plaintiff is not entitled to any damage."

Such request contained a correct principle of law applicable to the case.

41. Error of the presiding judge in modifying the defendant's eleventh request to charge. The request was as follows:

"If the plaintiff executed the paper in evidence marked form 607 and violated the agreement on his part contained therein, and such violation was the proximate cause of his injury or contributed thereto with the negligence of the defendants as a proximate cause thereof, the plaintiff is not entitled to any damage."

The modification was as follows: "I charge you that with this modification: Provided, under the circumstances, his violation thereof was negligence and such negligence proximate cause of the injury."

The error consisted in this: The negligence of the plaintiff need not be the proximate cause of the injury; it will relieve the defendant if it be a proximate cause, contributing with the negligence of the defendant.

42. Error of the presiding judge in refusing the defendant's sixteenth request to charge, which was as follows:

86 "A quotient verdict is illegal; that is, a verdict arrived at by agreement that each juror should name his estimate of the damages and that the sum of all the several estimates divided by twelve shall be the verdict. This is an improper way to arrive at a verdict."

Such request contained a correct principle of law and was an instruction proper to be given.

43. Error of the presiding judge in modifying the defendant's eighteenth request to charge. The request was as follows:

"If the plaintiff was not injured directly by the alleged defective coupling, but by a cause remotely, indirectly, connected therewith, and the plaintiff, before he was hurt, knew that it was out of repair, so that the attempt to use it was dangerous, and he nevertheless attempted to use it after such knowledge, it is for the jury to say whether under the circumstances he failed to exercise ordinary care and prudence, and was thereby guilty of negligence. If so he is not entitled to any damages."

The modification was as follows: "I charge you that with this modification: Provided there can be no negligence by use of appliances obviously defective."

The error consisted in this: (*a*) The constitutional provision in reference to the servant's knowledge of defective machinery applies only

to cases where the injury is caused directly by the defective condition of such machinery. Hence when the injury is not so caused, the servant may be guilty of contributory negligence in the uses of machinery which he knew was defective. (*b*) A servant may be guilty of contributory negligence in the use, or in the method of use, of appliances obviously defective.

44. Error of the presiding judge in refusing the defendant's nineteenth request so charge, which was as follows:

"If the jury believe from the evidence that the plaintiff has failed to prove any negligence on the part of either the railway company or either of the other two defendants, they must find for the defendants. The complaint being based upon a joint and concurrent tort the plaintiff must stand or fall by this allegation. He can-
87 not recover upon proof of negligence upon the part of any one, or any two of the defendants."

Such request contained a correct proposition of law applicable to the case.

45. Error of the presiding judge in refusing the defendant's twentieth request to charge, which was as follows:

"If the injury was caused directly by the act of the conductor alone, and remotely by the negligent act of the railway company, the railway company is entitled to a verdict."

Such request contained a correct principle of law applicable to the case.

V.

Motion for New Trial.

46. Error of the presiding judge in refusing the defendant's motion for a new trial, upon the following grounds:

(*a.*) The verdict in favor of the conductor and engineer settled in the railway company's favor the question of its liability by reason of the alleged negligence of those servants. There was nothing left in the case then except the alleged negligence regarding the defective coupler. The evidence as to that showed that it was not the proximate cause of the injury.

(*b.*) The plaintiff knew of the defective coupler before he went in between the cars, and that defect not having been the proximate cause of the injury, he assumed the risk and was guilty of negligence which caused or contributed to the injury.

(*c.*) The plaintiff by stipulation agreed not to go in between cars while in motion or attached to an engine for the purpose of coupling. He did so, was injured, and is now precluded from recovering damages.

(*d.*) The rules likewise forbid this act. He violated them, was injured and is now precluded from recovering damages.

(*f.*) The verdict shows that there was no joint and concurrent negligence as alleged.

88

VI.

Motion in Arrest of Judgment.

47. Error of the presiding judge in overruling the defendant's motion in arrest of judgment, upon the following grounds:

(*a.*) The alleged cause of action was the joint and concurrent negligence of the defendants. The ve-dict in favor of the conductor and engineer conclusively settles this question against the plaintiff.

(*b.*) The verdict is inconsistent with the plaintiff's cause of action.

VII.

Motion for Judgment.

48. Error of the presiding judge in refusing the defendant's motion to direct judgment to be entered in its favor on the verdict, upon the following grounds:

(*a.*) The alleged cause of action was the joint and concurrent negligence of the defendants. The verdict in favor of the conductor and engineer conclusively determines that the injury was not so caused.

(*b.*) The complaint and the testimony both showing that the alleged negligence of the railway company in the matter of the defective coupling was not the proximate cause of the injury, there is nothing left in the case except the alleged negligence in backing the train without signal, notice or warning. This is shown in like manner to have been the act of the conductor or engineer or both. The jury having found that neither of these servants was negligent in that or any other particular, no responsibility attaches to the railway company, their employer, for any act committed by them or by either of them. When the act of the servants is determined not to have been negligent, the same act, treated as the act of the master, through the instrumentality of the servant, cannot be so.

(*c.*) In an action against master and servant for an injury
89 caused by the alleged negligence of the servants, and a verdict is rendered in favor of the servants and against the master, the verdict in favor of the servants precludes a recovery against the master, and judgment should be rendered in favor of the master.

T. P. COTHRAN,
Attorney for Defendant, Appellant.

Greenville, S. C., Feb. 21st, 1903.

STATE OF SOUTH CAROLINA:

In the Supreme Court.

I, U. R. Brooks, clerk of the supreme court of South Carolina, do hereby certify that the foregoing is a true copy of the case on file in this office in the case of J. L. Carson against the Southern Railway Co.

Witness my hand and the seal of the supreme court of South Carolina at Columbia, this 26th day of Dec. A. D. 1903

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

90 THE STATE OF SOUTH CAROLINA:

In the Supreme Court, April Term, 1903, Eight- Circuit, Greenville County.

J. L. CARSON, Plaintiff-Respondent,
against
SOUTHERN RAILWAY COMPANY, Defendant-Appellant.

Opinion by Pope, C. J.

This action was commenced in the court of common pleas for Greenville county in this State to recover damages on account of personal injuries received by the plaintiff at Converse, S. C., August the 16th, in the year 1902 to wit: The plaintiff's arm was crushed between two cars, (while in the service of the defendant) which he was attempting to couple to-gether. The plaintiff's arm was amputated. The defendant demurred to the complaint because it failed to state facts sufficient to constitute a cause of action. This was overruled. The defendant objected to testimony, which objection was overruled. The defendant moved for a non-suit at the close of plaintiff's testimony in chief. This motion was overruled. The defendant objected to the charge of the circuit judge. The defendant moved for a new trial which motion was denied. The defendant then moved in arrest of judgment and this motion was refused. The defendant then and lastly made a motion for the circuit judge to direct a judgment in its favor on the verdict. This was denied. The verdict was in favor of plaintiff for $1,500. After entry of judgment the defendant appealed alleging error in all the matters or steps in the trial as above enumerated. To understand these objections it may be stated that the defendant has numbered its exceptions from the numeral 1 to the numeral 48, inclusive, and we will treat these exceptions in the same way. Inasmuch as the first 8 exceptions complain of the order of the circuit judge overruling the

demurrer, it will be proper to reproduce the complaint which is as follows:

91 The plaintiff complaining of the defendant alleges—

1.

That the defendant, Southern Railway Company, is a railway corporation chartered under and by the laws of the State of Virginia, and as such is, and was at the time hereinafter mentioned, doing business in the counties of Spartanburg, Greenville and other counties of the State of South Carolina, as a common carrier of passengers and also of freight, running its railroad track and trains, both passenger and freight, in and through the said counties of Spartanburg, Greenville, and other counties in the said State.

2.

That the defendants, J. C. Arwood and J. D. Miller, are now, and were on the dates hereinafter mentioned, citizens and residents of Greenville county, State of South Carolina.

3.

That the plaintiff is a resident of the county and State aforesaid is thirty five years of age, and has a wife and four children dependent upon his daily labor for support—his oldest child being twelve years of age.

4.

That since December the 8, 1901, plaintiff was in the employ of the defendant, Southern Railway Company, and was on that day assigned the duties of flagman, and on the 15th day of August, 1902, was assigned by defendant to duty on a freight train belonging to the defendant Southern Railway Company, in charge of its agents and employees, known as second section of No. 43, and running between Spencer, North Carolina, and Greenville, South Carolina, and plaintiff was assigned the duty of flagman on said freight train.

5.

That plaintiff entered upon, and performed the duties of such position, and on the 16th day of August, 1902, was ordered
92 by the conductor in charge of the said freight train, and whose orders he was required to obey, to do the work of brakeman on the said freight train—the regular brakeman on the said train having been assigned other duties.

6.

That while the said freight car was at a station known as Converse in Spartanburg county, State aforesaid, the right arm of plaintiff

was crushed by a collision of two freight boxes, whereby plaintiff suffered great and excruciating pain and mental anguish, and as a result lost entirely the said right arm, which had to be amputated; and that said collision and injury, which plaintiff sustained by reason thereof, were due to the joint and concurrent negligence, carelessness and fault of the defendants, and to their joint and concurrent recklessness, carelessness, willfulness and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit: That between Charlotte, North Carolina, and Greenville, South Carolina at the said station of Converse, said freight train of the said defendant, Southern Railway Company, stopped for the purpose of shifting to the side track of the said defendant Southern Railway Company, which side track was upon a steep grade and near the main line of defendant company, five freight cars or boxes; that there were at that time standing upon the side track three other freight cars or boxes, and, in order to prevent the said cars or boxes from rolling down the said steep grade, it was necessary to couple the said three cars or boxes to the five cars or boxes to be shifted and left upon the said side track, and this plaintiff was directed by the defendants to make the said coupling; that the defendant, J. C. Arwood, was conductor, and the defendant J. D. Miller, was engineer upon the said freight train; that the said freight boxes or cars were provided with what is commonly known as automatic couplers, and when said couplers are in good condition it is unnecessary for one in order to make the said coupling to go between the said cars, but the said couplers
93 worked with a pin and iron crank, the handle of which iron crank projects to the side of the said boxes or cars, and the said pin by which the said cars are coupled is manipulated by using the said crank; that after having effectually made one coupling between the said cars, as directed by the defendants, plaintiff approached to make the other coupling, as directed by the defendants, and before doing so he warned the defendants to hold said car steady until he, the plaintiff, was ready to make such coupling and until plaintiff should so signify; that when plaintiff reached the said car, then to be coupled, he ascertained that the coupling pin was out of and lying upon the draw head of the coupler, and thereby ascertained that the said coupler was out of order, in that when the said coupler is in proper condition there is what is known as a carter pin running through the said coupling pin at the lower end, thereby preventing it from being drawn entirely out of the said draw head, and the defendants knew, or ought to have known, that the said coupling pin was out of order, and this fact made it necessary for the plaintiff to go between the said cars for the purpose of adjusting the said pin with his hand, and to carry out the order of the defendants, since he could not while it was in that position, adjust it with the iron crank above described; and this plaintiff went between the said cars for the purpose of adjusting the said pin in order to make the said coupling, and as he was directed by

the said defendants, when he heard the cars of the said train in motion and knocking together before he had effected the said coupling, or had sufficient time so to do, and in order to save himself from being crushed between the said cars the plaintiff attempted to get out from between the said cars which he was engaged in the work of coupling, and as he did so his right arm was caught between the dead blocks of the said freight cars, between which he was standing, and was horribly mangled that at the time plaintiff heard the cars in motion he had only time
94 to go between the cars, and had placed his left hand upon the iron crank and his right hand upon the pin for the purpose of placing it in proper position, and had not had time to place the pin in proper position, or to couple the said cars; that the defendants by their joint and concurrent negligence, and by their joint and concurrent carelessness, negligence, recklessness, wantonness and wilfulness backed the said engine, to which was attached the said freight cars without any signal or warning from this plaintiff, and without giving this plaintiff time to effect the coupling of the said cars, and without giving this plaintiff any notice or warning whatsoever that the said engine and cars were to be moved.

7.

That in consequence of the said injury, it was necessary to amputate plaintiff's right arm just above the elbow, and in consequence of the said injury and amputation plaintiff had suffered great mental anguish and pain and — deprived of his strong right arm for the support of himself and family, all to his damage fifteen thousand dollars."

The exceptions are as follows as relating to the demurrer—

1. The error of the presiding judge in over-ruling the demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action.

2. Error of the presiding judge in not sustaining the first ground of demurrer to the complaint, which was as follows:

"The complaint does not show negligence on the part of the defendants or either of them."

3. Error of the presiding judge in not sustaining the second ground of demurrer to the complaint, which was as follows:

The complaint shows contributory negligence on the part of the plaintiff.

4. Error of the presiding judge in not sustaining the third
95 ground of demurrer to the complaint, which was as follows:

"So far as the allegation of negligence in regard to the absence of the cotter pin (defective machinery appliances) is concerned, the complaint does not show that the injury complained of resulted therefrom as a proximate cause thereof."

5. Error of the presiding judge in not sustaining the fourth ground of demurrer to the complaint, which was as follows:

So far as the allegation of negligence in regard to the backing of the engine without signal, warning or notice, is concerned, the complaint shows that this was the act of the engineer or conductor or both; it was therefore the negligence (if any at all) of the servant or servants of the railway company, for which the railway company in a proper action, may be held responsible. This action, however, is based upon an allegation of joint and concurrent tort on the part of master and servant. To constitute such a tort, it must appear that the master and servant each had a direct share therein, that they each actually participated therein. The imputed liability of the master for the wrong of the servant, in which the master has not participated and which he neither authorized nor ratified, does not in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort.

6. Error of the presiding judge in not sustaining the fifth ground of the demurrer to the complaint, which was as follows:

"The complaint alleges an act of negligence on the part of the master (failure to provide suitable appliances), and an act of negligence on the part of the servant or servants (backing the engine without notice, signal or warning). It does not charge any participation by either in the negligence of the other, and therefore does not present a case of joint and concurrent tort."

7. Error of the presiding judge in not sustaining the sixth ground of the demurrer, to the complaint, which was — follows:

96 "The principles contended for in specification IV are particularly applicable to the charge of joint, willful tort. The master cannot be held liable jointly with the servant for the wilful tort of the servant, unless the master authorized or ratified it."

8. Error of the presiding judge in not sustaining the seventh ground of the demurrer to the complaint, which was as follows:

"The complaint alleges that the acts of the defendants complained of were both negligent and willful. This is an impossibility. Negligence and willfulness are the opposites of each other."

1. This exception is too general. It is therefore over-ruled.

2. It seems to us that the allegations of the complaint directly charge negligence to the defendants, both jointly and severally. It alleges directly that the master erred in keeping the plaintiff supplied with proper machinery and in keeping such machinery in proper repair. The conductor was acting directly for the master when he failed to notice the want of any signal from the servant before ordering its train to move back. This exception is over-ruled.

3. No doubt the exception *relies* at this point to the failure in the plaintiff to carry out that rule of the defendant which forbids the servant from going between the cars to couple cars. But the allegation- of the complaint cure this apparent difficulty when the presence and directions of the conductor as vice principal is remembered. This exception is over-ruled.

4. A little reflection will show that this exception cannot be sustained. The complaint in paragraph 6 thereof is careful to do link the causes of the injury that the absence of the "cotter pin" from its proper place is not made the *causea causans* of his injuries. It was a matter for the jury to determine whether any or all of the acts of defendants viewed jointly or separately was the proximate cause of plaintiff's injuries. The quotations of authorities may
97 include Pickens *vs.* S. C. & G. R. R. 54 S. C. 498; Marsh *vs.* Western Union Tel. Co. 65 S. C. 430.

5. 6. and 7" exceptions are conclusively answered by the recent decision of Schumpert *vs.* R. R. 43 S. C. Reporter 813; Gardner *vs.* Southern *vs. Southern* R. R. Co. 43 S. C. Reporter 816. The appellant in his argument says. "They appear to be concluded, so far as this court is concerned. We do not waiver them." It declines to argue these exceptions and we think very properly so. These exceptions are over-ruled.

8. The appellant concedes that this exception is concluded by the case of Schumpert *vs.* R. R. Co. *supra* and formally abandons the same. Herein we sustain the circuit judge in over-ruling the demurrer.

2.

The single exception as to alleged error of the circuit judge in sustaining plaintiff's objection to the question asked plaintiff by defendant. The exception is in these words.

9. Error of the presiding judge in sustaining plaintiff's objection to the following question asked the plaintiff by defendants' counsel: Don't you know that if you had reported that (the fact that the pin was out of order) to the conductor this accident would not have occurred?"

The question was competent and relevant. It was plaintiff's duty, under rule 12, to report said defect, and his knowledge of the rule and its purpose had material bearing upon defendants' plea of contributory negligence.

9. This exception cannot be sustained. Appellant did not argue it. It was hardly asking for an opinion. How would witness know what effect such a report by him to the conductor would produce. It is over-ruled.

3.

We will next consider the group of exceptions relating to the non-suit which was refused.

98 10. Error of the presiding judge in over-ruling the first ground of defendants' motion for a non-suit, as follows:

I. The alleged negligence in regard to the absence of the cotter pin (defective machinery or appliances) is not shown, by any testimony tending to establish that fact, to have been a proximate cause of the injury complained of.

11. Error of the presiding judge in over-ruling the second ground of defendants' motion for a non-suit, as follows:

II. The testimony shows that the proximate cause of the injury was the plaintiff's voluntary and unnecessary exposure of his person to the moving cars.

12. Error of the presiding judge in over-ruling the third ground of defendants' motion for a non-suit, as follows:

III. The complaint alleages the plaintiff's injuries were caused by the joint and concurrent tort of the defendants. The evidence does not tend to sustain this allegation. On the contrary, if it tends to show any actionable negligence, it is the negligence of either the engineer or conductor, for which in a proper action the defendant company may be held liable, but which does not make out a case of joint and concurrent tort.

13. Error of the presiding judge in over-ruling the fourth ground of the defendants' motion for a non-suit, as follows:

IV. The plaintiff having alleged a joint and concurrent tort of all the defendants, the defendant, Southern Railway Company, has been deprived of the privilege of removing this cause to the United States court. He should be required to prove the facts alleged. To allow him to proceed in the State court without some evidence of this fact would deprive the defendant of a substantial right guaranteed by the Constitution of the United States.

14. Error of the presiding judge in over-ruling the fifth ground of the defendant's motion for a non-suit, as follows:

99 To allow the plaintiff, after alleging a joint and concurrent tort by the railway company and its servants, to recover without evidence of such joint and concurrent tort, but simply on evidence of a negligent act of the servant in which the master did not participate and which he neither authorized nor ratified, would deprive the defendant railway company of its property without due process of law, contrary to amendment XIV, Constitution of the United States for this reason; it would deprive said company of the right of reimbursement from the defaulting servant which would otherwise exist.

15. Error of the presiding judge in over-ruling the sixth ground of the defendant's motion for a non-suit, as follows:

The defendant company is not liable in punitive damages for the willful tort of one of its servants. To hold otherwise would deprive said company of its property without due process of law, contrary to the constitution of South Carolina, and art. XIV of the amendment to the Constitution of the United States.

16. Error of the presiding judge in over-ruling the seventh ground of the defendant's motion for a non-suit, as follows:

Even if the evidence tends to show an act of negligence on the part of the master (defective appliance) and an act of negligence on the part of the servant or servants (backing the train without notice, etc.) it does not tend to show any participation by either in the act

of the other, and therefore does not present a case of joint and concurrent tort.

17. Error of the presiding judge in over-ruling the eight- ground of the defendant's motion for non-suit, as follows:

The testimony does not tend to show any negligence, as alleged, on the part of the engineer, and even if it shows negligence as alleged on the part of the company, the action being based upon an alleged joint and concurrent tort of the defendants, it must for this reason fail.

100 18. Error of the presiding judge in over-ruling the ninth ground of the defendant's motion for a non-suit, as follows:

The testimony does not tend to show any negligence on the part of the engineer.

19. Error of the presiding judge in over-ruling the tenth ground of the defendant's motion for a non-suit, as follows:

The evidence shows that the defect in the coupler was known by the plaintiff before he attempted to go in between the cars.

20. Error of the presiding judge in holding: I am bound by the decision of the supreme court of this State, "and I will over-rule the motion for a non-suit."

Before passing upon the exceptions, it may be well to state that the appellant considers that those exceptions numbered as 12, 13, 14, 16 and 17, including as they do the question, in various phases, of the joint liability of master and servant for the single — of the servant, are, or seem to be, concluded, so far in this court, by the recent decision of Schumpert *vs.* Railway Co. *supra* and Gardner *vs.* Railway Co., *supra*. The appellant does not waiver them, but he has declined to argue them. This is a wise step on its part, for we hold that those decisions, so recently made, are conclusive as to these exceptions. So, therefore, we over-rule said exceptions numbered 12, 13, 14, 16 and 17. We will now examine the remaining exceptions under the head of non-suit;

10. We have already held that under the allegations of the complaint the absence of the "cotter pin" was not alone, of itself, the proximate cause of plaintiff's injuries. It was to be taken by the jury under the testimony here offered by the plaintiff as one of the elements of the proximate cause of such injuries. There was testimony offered by the plaintiff in this matter. Hence the circuit judge was precluded under many decisions of this court on the subject of non-suit, from granting the non-suit as here suggested.

101 Exception over-ruled.

11. We do not regard that the testimony shows that the proximate cause of plaintiff's injuries was the plaintiff's voluntary and unnecessary exposure of his person to the moving cars. We distinctly remember that the testimony tended to show that there were coöperating causes for these injuries. It was shown or rather there was testimony offered tending to show that the conductor ordered this servant, the plaintiff, to couple these cars. That such conductor, in this matter, represented the master. That the

servant called to such conductor to hold fast the train until he signalled, that this servant did not signal the conductor to move the train. That it was under these circumstances the train was moved so that the two cars bumped against each other thus causing his injuries. That when the cotter pin was out of its place it would be necessary for a servant to go between the cars to arrange it. That it was necessary to go between the cars to open the instrument by which the coupling was to be made. This exception is overruled.

15. We think the decisions of this State hold an approving view. It has been held in this State that the master is liable for the willful tort of its servants without the master authorizing or ratifying such tort. It ought to exist when these torts occur while such servants are carrying out the directions or plans of the master. Cobb *vs.* R. R. Co. 37 S. C. 194; Skipper *vs.* Clifton Manufacturing Co. 58 S. C. 143 and there are other cases to the same effect. This exception is overruled.

18. It must be remembered that the complaint charge- joint and several tort. There was testimony as to what the engineer did; he certainly moved the engine. Being testimony in the case connecting the engineer with the wrong alleged by the plaintiff, it was not the circuit judge's duty to pass upon the sufficiency of such testimony This exception is overruled.

19. Suppose that the plaintiff saw that the coffer pin was
102 out of its place. The circuit judge was bound by the case of Youngblood *vs.* R. R. Co. 60 S. C. at page- 17 and 18 when it is said. Furthermore, the only fact upon which the defendant relied to show that the plaintiff did not act with due care, was that he voluntarily operated the appliance- after knowledge of their unsafe condition, and as we have stated this could not defeat his action."

Besides it is provided in the constitution of 1895." Knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defence to an action for injury caused thereby.

Section 15 of article IX.

Besides a railroad employee may recover for injuries caused by the carelessness of a fellow servant directing him. Bussy *vs.* R. R. Co. 52 S. C. 438; Wilson *vs.* Ry. Co. 51 S. C. 79. Bodie *vs.* R. R. Co. 61 S. C. 468.

This exception is over-ruled.

20. The circuit judge was quite correct in declaring that he was bound by the decision of the supreme court. Being the court of last resort in this State as is the supreme court, its decisions govern the members of that court and all other persons on authority as well as other people.

This exception is over-ruled. We have thus passed upon all the phases of non-suit as here presented. We sustain the circuit judge in refusing such motion.

4.

We will next consider the group of exceptions relating to the alleged error of the circuit judge in his charge to the jury.

21. Error of the presiding judge in charging the jury as follows: "The law requires them (railroads) to keep suitable appliances for running such trains and to keep them in good condition. I charge you that any railroad engaged in running trains from State to State, under the law they are required to have automatic coupling, and I charge you further that they are required to keep
103 these appliances in good order, that is, in safe and suitable order." The error consisting in this: (1) The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in order. The charge of the judge imposes this duty absolutely upon the railway company; practically making it a guarantor of the safe and suitable condition of the coupling apparatus (2) The car upon which the defective coupler was, is shown by the testimony to have been an empty car on the side track, not used to move interstate commerce. The act of Congress therefore did not apply to it. This subdivision is an amendment to the exception and was allowed by respondent upon condition that it be accompanied with the statement that the point was not raised before the circuit judge that the act of Congress did not apply to the cars on side track.

22. Error of the presiding judge in charging the jury as follows, (the same being No. 1 of the plaintiff's requests.):

By act of Congress it is provided that, "on and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce to haul or to permit to be hauled or used on its line any car used in moving interstate traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' I charge that if you believe the defendant railway company was a common carrier engaged in interstate commerce, and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing the plaintiff's injury, and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence on the part of the railway company, which
negligence continued up to the very moment of the collision,
104 if you believe there was such a collision and injury in consequence thereof; and if you believe that such negligence was the proximate cause of such injury your verdict should be for the plaintiff.

"The rule of the defendant railway company forbidding employees going between cars for the purpose of coupling or uncoupling them may be waived by it; I charge you that the conductor is the representative of the railway company, and if said company fails to

furnish appliances to brakemen by means of which they may effect said coupling without going between the cars, or furnish them appliances which make it necessary for them to go between the cars to perfrom the work required of them and without objection, then it is for you to say whether or not such conduct on the part of the railway company amounts to a waiver of the said rule, and if you do find that it amounts to waiver, then I charge you that in such a case that the railway company cannot invoke the said rule in its behalf."

The errors consisting in: (A) The act of Congress applies only when the railway company fails to use cars equipped with automatic couplers. It does not apply where the railway company has equipped its cars with such couplers, one of which is temporarily out of repair. The complaint alleges, and the plaintiff's evidence shows, that the cars were equipped with automatic couplers, but that one of them was temporarily out of repair—that it could have been repaired in two minutes. The question therefore was whether the railway company had violated its duty to exercise ordinary care in keeping the coupler in repair, and not whether it had complied with the act of Congress. The latter had no application to the case.

(*b.*) It was error to charge that the failure to provide automatic couplers was negligence, which continued up to the very moment of the collision, for the reason that rule 12 made it the duty of the plaintiff to examine the coupler, and if defective report such
105 fact immediately. The plaintiff admitted that he knew it was defective before he attempted to make the coupling.

(*c.*) The act of Congress requires that the cars be equipped with couplers coupling automatically by impact, and which can be UNCOUPLED without the necessity of men going between the ends of the cars. It does not require that they be so arranged as to obviate the necessity of men going between the ends of the cars for the purpose of adjusting the knuckles for a COUPLING. The charge of the judge stamped it as negligence if the plaintiff in order to make a coupling or to adjust the knuckles had to go between the ends of the cars.

23. Error of the presiding judge in charging the jury as follows, (the same being No. 2 of the plaintiff's requests):

"I charge you that it was the duty of the railway company in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also see that the same were kept in proper repair, and if this duty was negligently performed, and the plaintiff sustained any injury thereby, the railway company is responsible in damages.

"I charge you that, provided the negligence of the railway company was the direct and proximate cause of the injury, and that the plaintiff did not contribute to the direct and proximate cause of the injury."

The error consisting in this: The duty of a master to a servant is to exercise ordinary care in keeping machinery and appliances in

repair. The charge imposes this duty absolutely upon the railway company, practically making it a guarantor of the safe and suitable condition of the coupling apparatus.

24. Error of the presiding judge in charging the jury as follows, (the same being No. 3 of plaintiff's requests):

"I charge you that the risk which a railway employé as-
106 sumes when he enters the employ of a railway company does not extend to such risks as he is exposed to by reason of defective machinery or appliances."

The error consisting in this: An employé assumes all risks except those which flow from the master's negligence in his duty in furnishing safe machinery and keeping the same in repair. The charge was erroneous in not so stating.

25. Error of the presiding judge in charging the jury as follows, (the same being No. 6 of plaintiff's requests)."

I charge you that contributory negligence on the part of the servant by using appliances obviously defective, furnished by a railway company, is no longer of force in South Carolina under the constitution of 1895."

The error consisting in this: The defendant contended that under rule 12 it was the duty of the plaintiff to examine the coupler before attempting to effect the coupling and to report any defect therein immediately. The charge eliminated this defense.

26. Error of the presiding judge in charging the jury as follows, (the same being No. 7 of plaintiff's requests):

"The fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to do the work required of him and he is, therefore, not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor."

The error consisting in this: (*a*) It is a charge upon the facts, in violation of the Constitution, art. V, sec 26. (*b*) It erroneously assumes that it was the conductor's duty to inspect the coupling. (*c*) It excludes from the jury enquiry as to the manner in which
the plaintiff may have done the work. (*d*) Under rule 12 it
107 was plaintiff's duty to examine the coupler and report defects immediately. (*e*) It relieves the plaintiff from the obligation to exercise ordinary care in avoiding danger. (*f*) It erroneously declares that no matter what the conditions are, whether known to the conductor or not, the plaintiff may blindly go ahead and do what he is told to do. (*g*) It states an erroneous principle of law. (*h*) It destroys the defense of contributory negligence and of sole negligence of the plaintiff.

27. Error of the presiding judge in charging the jury as follows, (the same being No. 8 of the plaintiff's requests)

"I charge you that a rule forbidding railway employés going between railway cars in motion, for the purpose of coupling or uncoupling them, or where attached to an engine, within itself is a

reasonable requirement, but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and if it fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done and in the performance of which said rule is violated."

The error consisting in this: The rule prohibits the brakemen from going between the cars while coupling or uncoupling them, either (1) while the cars are in motion, or (2) while an engine is attached to them. The charge declares that when the brakeman is injured while violating this rule, in either particular, the company cannot invoke the rule in its defense unless it has provided other means for the service which renders it unnecessary for the brakeman to go between the cars. In this error is assigned. As applied to (1) it means either that the company must stop the cars, or that it must provide means for the brakeman to make the coupling without going between the cars while they are in motion. If the former, the means were at hand, all that was necessary was a word
108 from the brakeman. If the latter, it presents the anomaly of requiring the company to furnish the means of performing the service in a way prohibited by it. As applied to (2) the same objections apply *mutatis mutandis*. The charge is erroneous for another reason. The plaintiff has stipulated in form 607 that he would not violate this rule and would not obey any order to that effect.

And for the further reason. The conditions which made it apparently necessary for the plaintiff to violate the rule may have been brought about by the negligence of a fellow servant of the plaintiff.

28. Error of the presiding judge in charging the jury as follows, (the same being No. 11 of the plaintiff's requests):

"I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine, or in motion, has no application to a case where the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling."

The error consisting in this. It should have been left to the jury to say whether or not the plaintiff had obligated himself, under rule 10 and form 607, to supply himself with *w* stick, even if it was not the duty of the court to so construe the rule and form, which defendants claims.

29. Error of the presiding judge in charging the jury as follows, (the same being No. 14 of the plaintiff's requests.

"If the jury find that the rule forbidding the going between the cars in motion or when attached to an engine, and forbidding the setting of pins and links except with a stick, was adopted by defendant railway company, when a method of coupling cars prevailed by the use of a pin and link; and if the jury find that the said method of coupling cars has been superseded by a method whereby

no pins need be set or pins and links need be used, then it is for the jury to say whether or not said rule was at the time of the
109 injury complained of in force and whether or not plaintiff was then bound by the same.

The error consisting in this: No matter what system may have been adopted, the danger of going between the cars while making a coupling was great, and the company had the right to provide by rule and contract against it. The charge makes this right depend upon the continuance of the link and pin method of coupling.

30. Error of the presiding judge in charging the jury as follows, (the same being No. 21 of the plaintiff's requests to charge):

"Notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge you that if the proof fails to show such joint and concurrent negligence on the part of all the defendants, yet shows negligence on the part of one or more of the defendants, which negligence resulted in injury to plaintiff as the sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence."

The error consisting in this: (*a*) By the simple allegation of joint and concurrent tort the defendant, Southern Railway Company, a foreign corporation, has been deprived of the right to remove the cause to the Federal court. The plaintiff should prove the allegations of his complaint. To allow a recovery against one only of several alleged joint and tort-feasors put it in the power of the jury to do as they did, find against the railway company and in favor of the servants whose negligence is alleged to have caused the injury. The defendant railway company is thus deprived of a substantial right, that of removal, guaranteed by the Constitution and laws of the United States.

(*b*.) A plaintiff has no right to come into court upon one alleged cause of action, for instance, a joint and concurrent tort, and recover upon proof of a several tort.

110 31. Error of the presiding judge in refusing the defendants' first request to charge as follows:

"The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant, Southern Railway Company, a foreign corporation, has been deprived of the right, where the tort was not joint and concurrent, to remove this cause to the United States court. To sustain this action the plaintiff must therefore prove that the acts complained of were the joint and concurrent negligence and tort of the railway company and at least one of the other defendants."

Said request contained a correct principle of law applicable to the case.

32. Error of the presiding judge in modifying the defendants' second request to charge, which was as follows:

"The negligence of a servant, for which, and on which account

only, the master is liable, is not the joint and concurrent negligence of the master and servant."

The modification was as follows: "I charge you that with this modification, unless the servant represents the master so that his acts will bind him and that you find that the servants of the company were negligent."

The error consisted in this: The request contained a correct principle of law applicable to the case. The modification emasculated the request. It was error to hold that where the servant represents the master, so that his acts will bind him, the negligence of the servant make out a case of joint and concurrent negligence on the part of both master and servant.

33. Error of the presiding judge in refusing the defendants' third request to charge, which was as follows:

"To constitute a joint and concurrent tort on the part of master and servant, it must appear that each had a direct share in such tort, that each actively participated therein. The imputed
111 liability of the master for the wrong of the servant, in which the master has not participated, and which he neither authorized nor ratified, does not in connection with the personal liability of the servant for the wrong, present a case of joint and concurrent tort."

Said request contained a correct principle of law applicable to the case.

34. Error of the presiding judge in refusing the defendants' fourth request to charge, which was as follows:

"To allow the plaintiff, after alleging a joint and concurrent tort, by a foreign corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort would deprive such corporation of the right of removal to the United States court, a right guaranteed by the Constitution and laws of the United States, and which would exist were the tort several and not joint and concurrent"

Said request contained a correct principle of law applicable to the case.

35. Error of the presiding judge in refusing the defendants' fifth request to charge, which was as follows:

"To allow the plaintiff, after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such servants, would deprive the railway company of its property without due process of law, contrary to amendment XIV, Constitution of United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant or servants, which would exist were the tort not joint and concurrent, but simply the wrong of the servant or servants for which the company may be liable."

Such request contained a correct principle of law applicable
112 to the case.

36. Error of the presiding judge in refusing the defendants' sixth request to charge, which was as follows:

"Even if the railway company was negligent in the matter of the alleged defective coupling, and the servant or servants were negligent in the matter of backing the train without signal, etc., they could not be held jointly liable for the combined results of their acts, if they acted independently in producing the injury and neither participated in the several act of the other."

Such request contained a correct principle of law applicable to the case.

37. Error of the presiding judge in modifying the defendants' seventh request to charge. The request was as follows:

"If the sole proximate cause of the plaintiff's injury was the negligence of the engineer, the jury must find for the defendant railway company; for an engineer or brakeman or flagman upon the same train while employed in the duties usually pertaining to their respective positions are fellow servants. A master is not liable to a servant for injuries received in consequence of the negligence of a fellow servant.

The modification was as follows:

"I charge you that, with this modification: If the plaintiff was not performing the ordinary duties for which he was employed, he does not assume the risk of negligence of fellow servants.

The error consisting in this. The request contained a correct proposition of law applicable to the case. Inasmuch as the evidence showed that the ordinary duties for which the plaintiff was EMPLOYED were those of a flagman, and that he was PRO TEMPORE performing not those duties but those of a brakeman; the modification was calculated to mislead the jury. Although the plaintiff may have
113 been EMPLOYED AS A FLAGMAN, yet if he for the day had undertaken the duties of a brakeman the rule of fellow-servants would apply.

38. Error of the presiding judge in modifying the defendant's eight- request to charge.

The request was as follows: "If the railway company furnished the plaintiff a rule book with the following rule:

"Cars must not be coupled or uncoupled or pins set by hand. For this purpose brakemen will use sticks which will be furnished
114 them on application, and every brakeman is required to supply himself with one of these sticks and see that it is long enough to prevent his going between the cars to couple or uncouple them or set pins. Any employé going in between cars while such cars are coupled to the engine or being so coupled for the purpose of coupling or uncoupling cars or to set pins or links or for any other purpose while the train of cars are in motion does so at his own risk.

'And if the plaintiff violated this rule and such violation was a proxi-ate cause of his injury or contributed thereto with the negligence of the defendants as a proximate cause thereof he is not entitled to any damage.'

The modification was as follows: 'I charge you that with this modification: Provided the rule is not contrary to law; has not been waived by defendant and the violation of the same was negligence and the proximate cause of the injury."

The error consisted in this: (*a*) The court, not the jury should have passed upon the question whether or not the rule was contrary to law. (*b*) The negligence of the plaintiff need not be the proximate cause of the injury it will relieve the defendant is it be a proximate cause contributing with the negligence of the defendant.

39. Error of the presiding judge in modifying the defendant's ninth request to charge. The request was as follows:

'If the railway company furnished the plaintiff with a rule book containing a rule warning him that going between cars in motion to couple or uncouple them was dangerous and violation
115 of duty and if they do so it will be at own risk; and if the pl-intiff violates this rule and such violation was a proximate cause of the injury or contributed thereto with the negligence of the defendant as a proximate cause thereof the plaintiff is not entitled to any damage.

The modification was as follows: I charge you that with the same modification as above.'

The error consisting in this: (*a*) The court not the jury should have passed upon the question whether or not the rule was contrary to law. (*b*) The negligence of the plaintiff need not be the proximate cause of the injury, it will relieve the defendant if it be a proximate cause contributing with negligence of the defendant.

40. Error of the presiding judge in refusing the defendant's tenth request to charge which was as follows:

'If the railway company furnished the plaintiff with a rule book containing a rule requiring him before exposing himself in working with the cars to examine for his own safety the condition of such cars or whatever he may undertake to work on or with and to promptly report to his immediate superior officer any defect therein affecting the *the* safety or any one using or operating upon or with the same, and if plaintiff violated such rule and such violation was the proximate cause of the injury or contributed thereto with negligence of the defendants as a proximate cause thereof the plaintiff is not entitled to any damage.'

Such request contained a correct principle of law applic-ble to the case.

41. Error of the presiding judge in modifying the defend-
116 ant's eleventh request to charge The request was as follows:

'If the plaintiff executed the paper in evidence marked form 607 and violated the agreement on his part contained therein and such violation was the proximate cause of the injury or con-

tributed thereto with the negligence of the defendants as a proximate cause thereof, the plaintiff is not entitled to any damage.

The modification was as follows: 'I charge you that with this modification: Provided under circumstances his violation thereof was negligence and such negligence proximate cause of the injury.'

The error consisting in this: The negligence of the plaintiff need not be the proximate cause of the injury. It will relieve the defendant if it be the proximate cause contributing with the negligence of the defendant.

42. Error of the presiding judge in refusing the defendant's sixtheenth request to charge which was as follows:

"A quotient verdict is iliegal; that is a verdict arrived at by agre-ment that each juror should name his estimate of the damages and that the sum of all the several estimates divided by twelve shall be the verdict. This is an improper way to arrive at a verdict.'

Such request contained a correct principle of law and was an instruction proper to be given.

43. Error of the presiding judge in modifying the defendants' eighteenth request to charge.

The request was as follows:

'If the *the* plaintiff was not injured directly by the alleged defect-
ive coupling but by a cause remotely indirectly connected
117 therewith and *and* the plaintiff before he was hurt knew
it was out of repair so that the attempt to use it was dangerous and he nevertheless attempted to use it after such knowledge, it is for the jury to say whether under the circumstances he failed to exercise or*id*nary care and prudence and was thereby guilty of negligence. If so he is not entitled to any damages.'

The modification was as follows: I charge you that with this modification: Provided there can be no negligence by use of appliances obviously defective.

The error consisting in this (a) The constitutional *np*-ovision in reference to the servant'- knowledge of defective machinery applies only to cases where the injury is caused directly by the defective condition of such machinery. Hence when the injury is not so caused the servant may be guilty of contributory negligence in the uses of machinery *of* which he knew was defective.

(*b.*) A servant may be guilty of contributory ne-ligence in the use or in the method of using *of* appliances obviously defective.

44. Error of the presiding judge in refusing the defendant's nineteenth request *so* charge which was as follows:

'If the jury believe from the evidence that the pl-intiff has failed to prove any negligence on the part of either the railway company or either *o* of the other *y*wo defendants they must find for the defendants. The complaint being based upon a joint and concurrent tort the plaintiff must stand or fall by this allegation. He cannot
recover upon proof of negligence upon the part of any one
118 or any two of the defendants.

Such request contained a correct proposition of law applicable to the case.

45. Error of the presiding judge in refusing the defendant's twentieth request to charge which was as follows:

'If the injury was caused directly by the act of the conductor alone and remotely by the negligent act of the railroad company the railway company is entitled to verdict.'

Such request contained a correct principle of law applicable to the case."

It is our duty to announce on the threshold of our investigation of these exceptions that the appellants here in *his* printed argument announces that its exceptions 30, 31, 32, 33, 34, 35, 36, 44 and 45 involves the question in various phases of the joint liability of master and servant for the single tort of the servant and that such exceptions appear to be concluded so far as this court is concerned by the recent decisions of this court on the two cases Schumpert *vs.* R. R. Co. *supra* and Gardiner *vs.* R. R. Co. *supra*. But they while making this admission do not waive their said exceptions For the reasons set out in those two decisions (which are so recently made as to render it unnecessary to repeat the arguments then used) we overrule these said exceptions. We will now proceed to pass upon the remaining exceptions of this group.

"21." Our decision of Gunter *vs.* Graniteville Manufacturing Co. 18 S. C. 262 Lason *vs.* Graniteville Manufacturing Co. 18 S. C. 275 Bussey *vs.* Charleston & Western Carolina Railway Co. 52 S. C. 119 438 Youngblood *vs.* South Carolina & Georgia R. R. Co. 60 S. C. page 9, and other cases in this State all hold that it is the duty of the master to furnish safe machinery and appliances to its servants and also to keep such machinery and appliances in good order. The master is not made a guarantor strictly. But it is his duty to furnish safe machinery and appliances and to preserve it in good order and reapir. The circuit judge did not use the word guarantor to the master. He correctly stated the rule in this State. *Under* the act of Congress in relation to coupling- to cars engaged in inter-state commerce preemptorily demands that carriers of interstate commerce shall use automatic couplings to the cars used by them. This defendant was a c-rrier of freight of interstate commerce and of course they were bound by the act of Congress no matter what rules they may have adopted for the government of their servants. The circuit judge properly stated the rule. It is well known that Congress took control of these matters for wise purposes among which was the protection of railroad employees. This exception is overruled especially as no specific request was made -or fuller instructions

"2." We cannot sustain this exception and it is overruled. The circuit judge had the act of Congress governing couplers on trains engaged in interstate commerce It would be the height of want of wisdom and a disregard of law for this act of Congress to be emasculated Courts and the people of this country are obliged to adhere to and be governed by acts of Congress. Of course Congress in- 120 tended when they directed these automatic couplers — should not only be provided and attached to cars but that such ap-

pliances should be kept in proper repair for constant use. It is the law of this State even if the act of Congress in question had overlooked this duty of keeping such appliances in good order which includes proper repair. This exception is overruled.

"23." We do not see that the judge's charge was improper. He charged the law of this State. He did not use language which made the master a guarantor of the machinery and appliances especially as the circuit judge was careful to say "provided the negligence of the master was the direct and proximate cause of the injury, &c."

This exception is overruled.

"24." There was no error here. The servant does not assume the risks of the master and as we have seen it is the master's duty to furnish safe machinery and appliances and keep the same in proper repair. Confine your criticism to what the judge actually charged; if a party wishes a fuller charge he must ask for it and then if the circuit judge is in error there is just ground of complaint. This exception is overruled.

"25." The constitution of 1895 is a full protection of the servant as to defective machinery and appliances. See section 15 of article IX. which has been construed in the cases Rutherford *vs.* So. Ry. Co. 56 S. C. 446 especially at pages 454 and 455. This exception is overruled.

"26." We do not regard the charge of the judge as a charge upon the facts. He is only laying down the law to govern the jury. He no where refers to the testimony itself he no where tells the
121 jury that the testimony in this case is such and it has frequently been held by this court that a master may waive the most stringent rules Take the papers of life insurance companies—how often is there found to be a waiver of the most stringent rules by their agents, why may not a conductor or a vice principal in the absence of the master but in the discharge of his responsible duties, waive the performance of a duty required of a servant under a particular rule. This exception is overruled.

"27." It is said that this charge is taken bodily from Buswell's Law — Personal Injuries at page 279 but be that as it may it is well known law that *that* the master or his personal representative the conductor may *wiave* rules which have been formulated for the general conduct of its business Exigencies arise when instant action must be taken "red tape" cannot — obtained. Prompt action must be taken Rules must give way This can be done and is done whenever the necessity arises which makes it either necessary or expedient This exception is overruled.

"28." This exception cannot be sa-tained Coupling or uncoupling cars with a stick when the servant has never had a stick furnished him by the master of course is not law. Let this exception be overruled.

"29." Of course it should have been left to the jury to say whether any change had been made This was all the circuit judge held This exception is overruled.

"37." The circuit judge left it to the jury to say whether
122 the plaintiff was performing his ordinary duties. It will be recalled that the duties of the plaintiff were those of a flagman on this train and not those of a coupler of cars as a brakeman. Having to obey orders of the master on that day he was required to couple cars The latter was not his ordinary or usual duty The servant only assumes the risk of negligence of fellow servants State *v.* Telephone Co., 61 S. C., 96 20 A. & E. 132 : 12 A. & E. 989—This exception is overruled

"38." The modification of the request as made by the circuit judge was properly made to meet the issues here presented. It was his duty to do so This exception is overruled

"39." This exception must be overruled upon the same ground set out in "38"

"40." We think the circuit judge fairly presented the issue and it would have been improper to have made this charge The request assumed that the violation of the rule by the servant would be negligence This exception is overruled.

"41." The modification of the request made by the circuit judge was proper This exception is overruled.

"42." We think the circuit judge very pro-erly refuse- to charge the quotient verdict would be illeg-l Never suggest evil to a jury Let them understand that 12 jurors must agree to a verdict -nd t-at such verdict must be based upon the law and the evidence It was within the judge's discretion at any rate. This exception id overruled.

"43." The modification of the request to charge was in strict conformity to the rule set up in our constitution of 1895 See 15 sec. article IX. This exception is overruled.

123 Having overruled all the exceptions in this group we will now dispose of the appeal relating to new trial.

5.

46. Error of the presiding judge in refusing the defendant's motion for a new trial upon the following grounds

(*a.*) The verdict in favor of the conductor and engineer settled in the railway company's favor the question of its liability by reason of the alleged negligence of those servants. There was nothing left in the case then except the al-eged negligence regarding the defective coupler The evidence as to that showed that it was not the proximate cause of the injury.

(*b.*) The plaintiff knew of the defective coupler b-fore he went in between the cars and that def-ct not having been the proximate cause of the injury he assumed the risk and was guilty of negligence which caused o- contributed to the injury

(*c.*) The plaintiff by stipulation agreed not to go in between the cars while in motion ar attached to an engine for the purpose of coupling He did so was injured and is now precluded from recovering damages

(*d.*) The rules likewise forbid this act He violated them was injured and is now precluded from recovering damages.

(*f.*) The negligence shows that there was no joint and concurrent negligence as alleged."

We should state that the appellant admitted that our recent case of Schumpert *v.* R. R. Co. *supra* and Gardiner *vs.* F. R. Co. *supra* seemed to conclude these questions of appeal We hold that they do.

124 Accordingly we overrule these exceptions we will next consider the exceptions relating to motion in arrest of judgment

The following is the exception

47. Error of the presiding judge in overruling the defendant's motion in arrest of judgment, upon the following grounds:

(*a.*) The alleged cause of action as the joint and concurrent negligence of the defendants The verdict in favor of the conduc-or and engineer conclusively settles this question against the plaintiff

(*b.*) The verdict in inconsistent with the plaintiff's cause of action."

We reamrk that *that* appellant did not argue this exception He alleged that *if* it appeared to be governed by the two late decisions of this court Schumpert *vs.* R. R. Co. *supra* and Gardiner *vs.* R. R. Co. *supra* He does not abandon these grounds but still he does not argue them We think these points are ruled by the principle upheld by those two cases jurt cited and for the reasons therein given we overrule these exceptions.

7.

Lastley we will pass upon the questions made in the exceptions under the head "Motion for judgment" The exceptions are as follows:

48. Error of the presiding judge in refusing the defendant's motion to direct judgment to be entered in its favor on the verdict upon the following grounds:—

(*a.*) The alleged cause of action was the joint and concurrent negligence of the defendants. The verdicr in favor of the con-

125 ductor and engineer conclusively determines that the injury was not so caused.

(*b.*) The complaint and testimony both showing that the alleged negligence of the railway company in the matter of the defective coupling was not the proximate cause of the injury there is nothing left in the case except the al-eged negligence in backing the train without signal notice or warning. This is shown in like manner to have been the act of the conductor or engineer or both. The jury have found that neither of these servants was negligent in that or any other particular, no responsibility attaches to the railway company their employer for any act committed by them or by either of them. When the act of the servant is determined not to have been negligent the same act treated as the act of the master through the instrumentality of the servant cannot be so.

(*c.*) In an action against the master and servant for an injury caused by the alleged negligence of the servants and a verdict is rendered in favor of the servant and against the master the verdict in favor of servants precludes a recovery against the master and judgment should be rendered in favor of the master.

This exception must be overruled for these reasons The master is responsible for the torts of his servants committed by them during the administration of the duties of their offices respectively. That the servants are not held responsible personally is because such torts were committed in the master's service "One may be taken . and the others left."

126 (*b.*) We do not accept the doctrine that the defective coupler was to be considered as the proximate cause of plaintiff's injuries.

It was a compound made up of several wrongs on- part — which made up the proximate cause of injury This we have hereinbefore announced.

(*c.*) We do not hold with the plaintiff in this subdivision of his exceptoion We do not think that a verdict in favor of the servants turns the master loose thereby.

This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be and it is hereby affirmed.

A true copy.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

127 Know all men by these presents, that we, Southern Railway Company, as principal and L. M. McBee, as sureties are held and firmly bound unto James L. Carson in the full and just sum of two hundred and fifty dollars to be paid to the said James L. Carson his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of November in the year of our Lord one thousand nine hundred and three.

Whereas, lately at a term of the supreme court of South Carolina in a suit depending in said court, between James L. Carson plaintiff and Southern Railway Company *et al.* defendants a decree was rendered against the said Southern Railway Company and the said Southern Railway Company having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said James L. Carson citing and admonishing him to be and appear at a United States Supreme Court to be holden at Washington on the day in the said citation mentioned.

Now the condition of the above obligation is such that if the said Southern Railway Company shall prosecute its appeals to effect and answer all damages and costs if it fail to make its plea good,

then the above obligation to be void; else to remain in full force and virtue.

SOUTHERN RAILWAY COMPANY. [SEAL.]
T. P. COTHRAN, *Att'y.* [SEAL.]
L. M. McBEE. [SEAL.]

Sealed and delivered in presence of—
L. E. SULLIVAN.
JONES SULLIVAN.

Approved by—
Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

30th Nov. 1903.

128 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

JAMES L. CARSON, Plaintiff, Respondent,
against
SOUTHERN RAILWAY COMPANY, J. C. ARWOOD, and J. D. MILLER, Defendants, of Whom Southern Railway Company is Appellant.

To the Hon. Y. J. Pope, chief justice of the supreme court of South Carolina:

The petition of Southern Railway Company respectfully shows as follows:

1. That the above stated action was commenced in the court of common pleas for Greenville county on the 24th of Sept., 1902 for $15,000 damages on account of the alleged negligence of the defendants resulting in personal injury to the plaintiff, his right arm having been crushed between the cars which he was attempting to couple, at Converse, S. C. on Aug. 16, 1902.

2. That issues having been joined, the said cause was tried at Greenville S. C. before Hon. R. C. Watts and a jury, Nov. 17, 1902 resulting in a verdict of $6,500 in favor of the plaintiff against the defendant, Southern Railway Company, alone.

3. That the said defendant appealed to the supreme court of South Carolina from the judgment entered upon said verdict, which court on the 18th of *of* Aug. 1903 filed its opinion and judgment affirming the judgment below.

4. That in the record of said proceedings it appears that certain rights, privileges and immunities claimed by said defendant
129 under the Constitution and *and* laws of the United States are dicided adverse to the petitioner.

Wherefore the petitioner prays that a writ of error be allowed whereby the judgment of this court may be reviewed by the Supreme Court of the United States.

SOUTHERN RAILWAY COMPANY,
By T. P. COTHRAN, *Attorney.*

Greenville S. C. Nov. 30, 1903

STATE OF SOUTH CAROLINA,
County of Greenville, S. C.

Personally appeared T. P. Cothran, and on oath says: That he is attorney for the defendant, Southern Railway Company. That the foregoing petition is true of his own knowledge.

T. P. COTHRAN.

Sworn to and subscribed before me this the 30 day of Nov. 1903.
[SEAL.] W. C. COTHRAN,
Not. Pub., S. C.

Upon reading and filing the petition of Southern Railway Company herein for writ of error it is ordered, that the petition be granted and that a writ of error issue requiring the transcript of record herein be certified to the Supreme Court of the United States, whereby the judgment herein may be reviewed by said court.

Y. J. POPE,
Chief Justice of the Supreme Court of South Carolina.

Columbia S. C. Nov. — 1903

130 THE STATE OF SOUTH CAROLINA:

In the Supreme Court.

JAMES L. CARSON, Plaintiff, Respondent,
against
SOUTHERN RAILWAY COMPANY ET AL., Defendant-, Appellant-.

The defendant, Southern Railway Company, in connection with its petition for a writ of error in the above stated case, makes the following assignments of error which it *owns* occurred upon the trial of said cause and in the judgment of the said supreme court.

1. Error of the supreme court of South Carolina in overruling the defendant's 30th exception which was as follows:

"Error of the presiding judge in charging the jury as follows: (the same being No. 21 of plaintiff's request- to charge):

'Notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge

you that if the proof fails to show such joint and concurrent negligence on the part of one or more of the defendants, which negligence resulted in injury to plaintiff as sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence.'

The error consisting in this: (a) By the simple allegation of joint and concurrent tort the defendant, Southern Railway Company,
131 a foreign corporation has been deprived of the right to remove the cause to the Federal court. The plaintiff should prove the allegations of his complaint. To allow a recovery against one only of several alleged joint tort-feasors put it in the power of the jury to do as they did, find against the railway company and in favor of the servants whose negligence is alleged to have caused the injury. The defendant railway company is thus deprived of a substantial right that of removal guaranteed by the Constitution and laws of the United States."

2. Error of the supreme court of South Carolina in overruling the defendant's 31st exception, which was as follows:

"Error of the presiding judge in refusing the defendants' first request to charge as follows:

'The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant Southern Railway Company, a foreign corporation has been deprived of the right where the tort was not joint and concurrent to remove this cause to the United States court. To sustain this action the plaintiff must therefore prove that the acts complained of were the joint and concurrent negligence and tort of the railway company and at least one of the other defendants."

3. Error of the supreme court of South Carolina in overruling the defendant's 34th exception which was as follows:

"Error of the presiding judge in refusing the defend-
132 ant's *defendant's* fourth request to charge which was as follows:

'To allow the plaintiff, after alleging a joint and concurrent tort, by a foreign corporation and its servant or servants to recover damages without proof of such joint and concurrent tort would deprive such corporation of the right of removal to the United States circuit court, a right guaranteed by the Constitution and laws of the Unitad States and which would exist were the tort several and not joint and concurrent."

4. Error of the supreme court of South Carolina in overruling the defendant's 35th exception which was as follows

"Error of the presiding judge in refusing the defendant's fifth request to charge which was as follows

'To allow plaintiff after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such servant or servants, would deprive the railway company of its property without due

process of law, contrary to amendment XIV. Constitution of United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant or servants, which would exist were the tort not joint and concurrent but simply the wrong of the servant or servants for which the company would be liable.'"

5. Error of the supreme court of South Carolina in overruling the defendant's 15th exception, which was as follows

"Error of the presiding judge in overruling the sixth
133 ground of the defendant's motion for a non-suit as follows
'The defendant company is not liable in punitive damages for the wilful tort of one of its servants. To hold otherwise would deprive said company of its property without due process of law contrary to the constitution of South Carolina and art. XIV of the amendment- to the Constitution of the United States.'"

6. Error of the supreme court of South Carolina in overruling the defendant's 22nd exception which was as follows:

"Error of the presiding judge in charging the jury as follows, (the same being No. 1. of the plaintiff's requests):

'By act of Congress it is provided that, "on and after the first day of January 1898 it shall be unlawful for any common carrier engaged in interestate commerce to haul or permit to be hauled or used on its line any car used in moving interestate traffic, not equipped with coupler coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

I charge that if you believe the defendant railway company was a common carrier engaged in interstate commerce and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing the plaintiff's injury and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling such failure to provide such automatic couplers *as* negligence on the part of the railway company, which negligence
continued up to the very moment of the collision if you
134 believe there was such collision and injury in consequence
thereof, and if you believe that such negligence was the proximate cause of such injury your verdict should be for the plaintiff. The error consisting in this: The act of Congress applied only when the railway company fails to *to* use cars equipped with automatic —. It does not apply where the railway company has equipped its cars with such couplers one of which is temporarily out of repair. The complaint alleges and the plaintiff's evidence shows that the cars were equipped with automatic couplers but that one of them was temporarily out of repair—that it could have been repaired in two minutes. The question therefore was whether the railway company had violated its duty to exercise ordinary care in keeping the coupler in repair and not whether it had complied with the act of Congress. The latter had no application to the case.

The act of Congress requires that the cars be equipped with couplers coupling automatically by impact and which can be UNCOUPLED without the necessity of men going between the end- of cars It does not require that they be so arranged as to obviate the necessity of men going between the ends of cars for the purpose of adjusting the knuckles for a COUPLING. The charge of the judge stamped it as negligence if the plaintiff in order to make a coupling or to adjust the knuckles had to go between the ends of the cars.

T. P. COTHRAN,
Attorney for So. Rwy. Co.

135 The Supreme Court of the United States.

The United States of America to James L. Carson, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Supreme Court, to be holden at the city of Washington, on the 29th day of December, 1903, pursuant to a writ of error filed in the clerk's office of the supreme court of South Carolina, wherein Southern Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this — day of December, in the year of our Lord one thousand nine hundred and three, and in the Independence of the United States of America the one hundred and twenty-eight.

Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

30th November 1903

135½ [Endorsed:] United States of America. In supreme court. J. L. Carson *vs.* So. Ry. Co. Citation.

Due and legal personal service of within citation acknowledged at Greenville, S. C. Dec. 22, 1903.

McCULLOUGH & McSWAIN,
Att'ys for Pl'ff.

136 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of South Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of the State of South Carolina, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between James L. Carson and Southern Railway Company, *et al.*, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision -as against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great injury of the said Southern Railway Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 29th day of December, 1903 (1), in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the said Supreme Court the 23 day of December, in the year of our Lord 1903.

[Seal U. S. Circuit Court, District of South Carolina.]

C. J. MURPHY,
Clerk of the Circuit Court of the United States for Dist. South Carolina.

Allowed by
Y. J. POPE,
Chief Justice of the Supreme Court of the State of South Carolina.

30 Nov. 1903.

[Endorsed:] United States of America. In supreme court. Southern Ry. Co. pl'ff in error *v.* James L. Carson def't in error. Writ of error.

137 STATE OF SOUTH CAROLINA:

In the Supreme Court.

I, U. R. Brooks, clerk of the supreme court of South Carolina do hereby certify that the foregoing are true copies of the case, opinion, bond assignment of error, petition *of* writ of error and the writ of error and citation.

Witness my hand and the seal of the supreme court of South Carolina, at Columbia, this 26th day of December A. D. 1903.

[Seal Supreme Court of South Carolina.]

U. R. BROOKS, *Clerk.*

Endorsed on cover: File No. 19,197. South Carolina supreme court. Term No. 546. Southern Railway Company, plaintiff in error, *vs.* James L. Carson. Filed January 13", 1904. File No. 19,197.

FILE COPY.

In the Supreme Court of the United States.

October Term, 1908.

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against
JAMES L. CARSON, Defendant in Error.

In error to the Supreme Court of the State of South Carolina.

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Brief in behalf of the plaintiff in error upon motion of defendant in error to dismiss writ of error and to affirm judgment.

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Preliminary Statement.

The defendant in error, James L. Carson, was a brakeman employed by Southern Railway Company. On August 16th, 1902, while attempting to make a coupling of two freight cars at Converse, S. C., upon the line of the said Railway, his right arm was crushed, necessitating amputation.

On September 24th, 1902, he instituted an action in the Court of Comon Pleas for Greenville County, S. C., against the said Railway Company and J. C. Arwood, Conductor, and J. D. Miller, Engineer, alleging that his injury was caused by the joint and concurrence negligence and wilfulness of the said three defendants in the particulars specified, to wit, (1) in having a defective coupler. (2) In backing the cars for the purpose of making a coupling without notice or warning to the plaintiff.

The circumstances of the accident, detailed by the plaintiff were substantially as follows: He was engaged at the time as brakeman upon a freight train running between Spencer, N. C.,

and Greenville, S. C. ; at Converse, an intermediate station, certain freight cars in his train were to be cut out and left upon a side track ; upon this side track thre were at the time two other freight cars to which it was desired to couple the cars to be left there ; Carson was directed by the conductor to make the couplings to these cars ; his train was backed into the side track and the coupling with the forward car of the moving train and the first of the stationary cars on the side track was made safely ; the stationary cars on the side track were some five or six feet apart ; after making the first coupling Carson went forward to make the second ; when he caught hold of the lever to adjust the knuckles for this second coupling he discovered that the pin which prevented the coupling pin from coming all the way out of the knuckle was lost and that he could not make the coupling without going in between the cars and adjusting the knuckle by hand ; while so engaged the cars came together and mashed his arm ; he stated that he warned the conductor to hold the cars steady till he was ready for them to come back.

The testimony, for the defendants did not materially differ from the foregoing, except upon the point that the conductor and engineer knew that Carson was going to adjust the knuckle by hand and that they were warned to hold the cars steady. They showed that they had no knowledge of the defective coupler or of Carson's purpose to go in between the cars. Disinterested witnesses testified that Carson give no notice to anybody, but that as soon as he discovered the pin missing, while the cars were coming back upon him, he rushed in hoping to adjust the coupling in time, but failed. One witness who was not more than six feet from him was so impressed with the impending disaster that he yelled to Carson not to go in.

The case was tried at Greenville before Judge Watts and a jury, November, 1902. The jury returned a verdict in favor of the plaintiff against the Southern Railway Company for $6,500, No mention was made in the verdict of the other two defendants, the conductor and the engineer : which in law is equivalent to a finding in their favor.

The defendant Southern Railway Company then appealed to the Supreme Court of South Carolina, which on the 18th August, 1903. affirmed the judgment below.

Whereupon the said Southern Railway Company prayed for and was allowed a writ of error in this Court.

Points and Authorities.

We respectfully submit that this writ of error involves the following Federal question :

I.

The right of removal depending absolutely upon the allegations of the plaintiff's complaint, where he alleges a joint and concurent tort, the foreign defendant is thereby concluded. He should not therefore be allowed to recover upon a state of facts which, if alleged, would present a separable controversy, a removable cause.

To effectually defeat the right of the foreign defendant to remove a case to the Federal Court, at the inception of a suit, all that the plaintiff has to do is to join one of the servants as a codefendant and allege that the injury was caused by the joint and concurrent negligence of the master and servant.

"A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to a final decision in his own way. The cause of action is the subject matter of the controversy, *and that is*, for all the purposes of the suit, *whatever the plaintiff declares it to be in his pleadings.*"

Powers vs. R. Co. 169 U. S. 92.
Dixon vs. R. Co. 179 U. S. 131.

The plaintiff, in the case at bar, having alleged that his injuries were caused by the joint and concurrent negligence and wilfulness of the three defendants, the Southern Railway Company was concluded by that allegation and made no effort to remove the cause.

The verdict plainly exemplifies the injustice against which we inveigh. The jury having found in favor of the conductor and engineer, that is a judicial declaration that the negilence charged to them was not established. The negligence charged to the Railway Company, upon which alone can the verdict now be ascribed, was the matter of the defective coupler, with

which the employee defendants had nothing to do. If the complaint had counted upon that act of negligence alone, the Railway Company could have excercised its right to remove the case. Now it has been deprived of that right by allegation of joint and concurrent negligence judiciously declared not to have invested, and recovery had upon a distinct ground which if alleged would have furnished ground for removal.

It is no sufficient answer to our position to say that this does not present a Federal question for the reason that the right of removal was not invoked by the Railway Company. The right of removal was not invoked because it had been destroyed by the plaintiff's allegation of joint and concurrent tort. Since this allegation is so destructive of the defendant's privilege and of such consequence to the conceived interests of the plaintiff, it does seem that he should be compelled to prove what he has alleged, and not be allowed to recover upon a state of facts entirely different, and which if alleged in the first instance would have permitted a removal.

If this be the law, the plaintiff may always insert as a co-defendant a man of straw, with an allegation of joint and concurrent negligence, and after the real defendant has thus been compelled to remain in the State Court and answer, make no proof against the nominal defendant whatever, and recover his judgment against the real defendant.

It may be true that in such a case the defendant corporation might petition for removal upon the grounds of fraud, but when the agents are joined under an allegation of joint and concurrent negligence, the truth of such allegation can only be ascertained by a joint trial.

II.

To allow plaintiff after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such a servant, or servants, would deprive the Railway Company of its property without due process of law, contrary to Amendment XIV Constitution of United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant or servants, which would exist were the tort not joint

and concurrent, but simply the wrong of the servant or servants for which the company would be liable.

This is the fourth assignment of error, see Transcript, F. 132.

The doctrine is well settled that there is no contribution or re-inbursement as between joint tort-feasors. "When two parties acting together commit an illegal or wrongful act, the party who is held responsible in damages for the act cannot have indemnity or contribution from the other, because both are equally culpable, or *participes criminis*, and the damage results from their joint offense." *Gray vs. Boston Co;* 114 Mass. 149.

If therefore in such an action a verdict should be rendered against the master it must be referred to the cause of action declared upon, the joint and concurrent negligence; and when the master pays off the judgment he could not enforce re-imbursement from the servant, for the reason that it had been determined that the tort was joint and concurrent. This result would follow although the proof showed that the tort was that of the servant alone, for the verdict upon that declaration would be conclusive and this evidence could not be enquired into in a subsequent action by master against the servant for re-imbursement.

It is not contended that an action could not be brought against both master and servant for a tort committed by the servant within the scope of his agency. We think that such an action could be brought, and that in the event of recovery and payment of judgment by master the latter could maintain his action for re-imbursement against the defaulting servant. But in such case the liability of the master springs from the operation of the law of *respondeat superior;* unless he participates in the wrong there can be no *joint* liability.

Where, however, the master and servant are sued upon an allegation of joint negligence, recovery should not be allowed except upon proof of such joint negligence. Otherwise the master could not enforce his right of re-imbursement.

Gableman vs. R. Co; 82 Fed. 790.
Doremus vs. Root, 54 L. R. A. 649.
Campbell vs. Portland Co; 6 Am. R. 503.
Pearsons vs. Winchell, 52 Am. D. 745.
Warax vs. R. Co; 72 Fed. 637.

Pomeroy Rem; sec. 308.
Landers vs. Felton, 73 Fed. 311.
Buswell Pers. Inj. 31.
Gas Co. vs. City, 9 Rich. (S. C.) 342.
Bolan vs. Williamson, 1 Brev. 181.

But, it may be insisted, as the verdict in this case is only against the Railway Company, how is it prejudiced? The answer is this: It is impossible to say upon what the verdict of the jury was rendered. Logically it can be supported only upon the ground that the Company was negligent in the matter of the defective coupler. But it is possible that the jury took the same view of the law which the Supreme Court of South Carolina has announced, that the verdict may have been based upon the negligence of the servants although their verdict would point otherwise. The Court says: "The master is responsible for the torts of his servants committed by them during the administration of the duties of their offices respectively. *That the servants are not held responsible personally is because such torts were committed in the master's service. "One may be taken and the others left."* (Transcript F. 125)

III.

A master is not liable in punitive damages for the wilful tort of one of his servants. To hold otherwise would deprive the master of his property without due process of law contrary to the 14th amendment Constitution of the United States.

It is interesting to note the course of the decisions in this State, (South Carolina) upon the subject.

In Parker vs. Gordon, Dudley 270, it is held that the master is not liable at all, not even in compensatory damages, for the wilful tort of the servant.

In McClenahan vs. Brock, 5 Rich. 27, it is held that the master is not liable for the wilful act of his servant.

In Brown vs. Griffin, 13 Rich. 37, it is suggested, though not decided, that the master may be held liable for the wilful tort of the servant.

In Redding vs. R. Co., 3 S. C., 1, it is held that the master is responsible in damages for the *wilful* act of his servant if done within the scope of his employment, though it is

strongly intimated, if not decided, that the master would not be responsible for the *malicious* act of the servant. Nothing is said about the master's liability in punitive damages.

In Palmer vs. R. Co., 3 S. C., 580, the point was first decided, if the statement of the Chief Justice, Willard, be correct. "The question, whether a corporation is liable to respond in exemplary damages for the misconduct of an agent, has not been settled in this State."

In this case the doctrine of the master's liability in exemplary damages was sustained upon the expressly stated "limited basis" of the relation of the passenger to the common carrier. The learned Justice cites nine cases in his opinion. Of these only two directly sustain his ruling. The case of R. Co. vs. Quigly, 21 How., 202, cited in the Palmer case proceeded upon the doctrine of express authority. The Board of Directors authorized the publication.

In Hall vs. R. Co., 28 S. C., 261, the question was not raised, the Court saying: "The Circuit Judge laid down the rule as to exemplary damages in terms to which no exception has been taken, and therefore for the purposes of this case at least, it must be regarded as the correct rule."

In Avinger vs. R. Co., 29 S. C., 265, exemplary damages were allowed against a corporation, but that was a suit to recover damages for a wilful failure and refusal to carry goods. It was the direct act of of the corporation, and the question of responsibility for the acts of the servant was not involved.

In Quinn vs. R. Co., 29 S. C., 381, the question was decided squarely against our contention, upon the authority of the Palmer and Hall cases, and Sutherland on Damages. The case of State vs. Morris &c. R. Co., 23 N. J., 369, cited in the opinion does not sustain the conclusion arrived at by the Court, for the reason that it only declares the undisputed principle that the master is liable in compensatory damages, not in exemplary damages, for the wilful act of the servant.

In Rucker vs. Smoke, 37 S. C., 377, the point is again decided against our contention, but upon authorities which are scant support for the proposition. For instance: Reynolds vs. Witte, 13 S. C., 18, was a suit to hold the principal responsible for the fraud of his agent. The agent had hypothecated securities fraudulently, and the defendant, his

principal, was held responsible for the agent's fraud, not in exemplary damages but in compensatory damages. The quotation from 1 Am. & Eng. Enc. L., 410, states no more than the undisputed rule that the master is liable for the negligence or fraud of the servant, in compensatory damages. The South Carolina cases cited, fall very far short of sustaining the proposition. Reading, Palmer, Hall, Avinger and Quinn have already been referred to. Epstain vs. Brown, was a direct action against the actual tort feasor. Parkerson vs. Wightman was a suit for compensatory damages against a landlord for an unlawful distress by his bailiff. It was held, "A principal is liable for the conduct of his agent, when he acts improperly and unlawfully but within the scope of his agency." As to this proposition there cannot be a question. In the opinion by Judge Richardson we find the following :

"It is conceded that the principal is not bound for the wilful trespass of his agent. . . . So that, according to my understanding of the law of principal and agent, the case presents a striking illustration of the liability of a principal for the conduct of his agent, when he acts improperly and unlawfully, but within the scope of his agency. If Dennis (the bailiff) had committed a wilful outrage or trespass, Wightman (the landlord) could not have been made liable." Citing the case, Oneal vs. Reigne, Miss. Dec. 1827, 2 Rice Digest 93. In that case it is held that the Master is not responsible for the wilful act of the servant. The separate opinion of Judge Withers, in the Parkerson case, concurred in by Judge O'Neall, contains a dissent upon another branch of the case, but as to the other point it is said : "The general rule is the intelligible and safe one, that wherever an agent, particularly a special and limited agent, does a wilful act that is unlawful, though he may not connect it with the current events of his agency, or cause it to spring from them, the master or principal shall not be presumed to have authorized it or to be responsible for it ; a *fortiori* shall he not be where the act is forbidden both by himself and the plain duty of the statute law."

The next case upon the subject is Cobb vs. R. Co., 39 S. C., 194, where the doctrine of the master's liability in

damages (not expressly stated *exemplary*) for the wilful act of the servant is announced without discussion.

At last comes the case of Skipper vs. Mfg. Co., 58 S. C., 143, which announces the doctrine that the master is responsible in exemplary damages for the wilful act of the servant, upon the authority of the cases of Rucker vs. Smoke, and Cobb vs. Ry.

In none of the cases decided in this State was the constitutionality of making one person suffer for the act of another raised. We propose to discuss the question from that standpoint.

The question of the liability of the master in punitive damages for the wilful tort of the servant is learnedly discussed in the case of Lake Shore and Michigan Southern R. Co. vs. Prentice, 147 U. S. Supreme Court Reports, 101, and decided by unanimous Court in the negative. The plaintiff brought suit for damages for the malicious arrest and other indignities imposed upon him by the conductor of one of the defendant's passenger trains, upon which the plaintiff was a passenger.

The court denied the right to recover punitive damages for the wilful tort of the servant, unless the defendant authorized or ratified the act. They say: "Exemplary or punitive damages, being awarded, not by way of compensation to the sufferer, but by way of punishment of the offender, and as a warning to others, can only be awarded against one who has participated in the offence. A principal, therefore, though of course liable to make compensation for injuries done by his agent within the scope of his employment, cannot be held for exemplary or punitive damages, merely by reason of wanton, oppressive or malicious intent on the part of the agent." The Court further says: "A corporation is doubtless liable, like an individual, to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express order of the principal."

And again: "Though the principal is liable to make compensation for a libel published or a malicious prosecution instituted by his agent, he is not liable to be punished by exemplary damages for an intent in which he did not participate.

In Detroit Daily Post Co. vs. McArthur, in Evinson vs. Cramer, and in Haines vs. Schultz, above cited, it was held that the publisher of a newspaper, when sued for a libel published therein by one of his reporters without his knowledge, was was liable for compensatory damages only, and not for punitive damages, unless he approved or ratified the publication; and in Haines vs. Schultz the Supreme Court of New Jersey said of punitive damages: 'The right to award them rests primarily upon the single ground—wrongful motive.' 'It is the the wrongful personal intention to injure that calls forth the penalty. To this wrongful intent, knowledge is an essential prerequisite.' 'Absence of all proof bearing on the essential question, to wit, the defendant's motive, cannot be permitted to take the place of evidence, without leading to a dangerous extension of the doctrine *respondeat superior*.'"

And again: "No doubt, a corporation, like a natural person, may be held in exemplary or punitive damages for the act of an agent within the scope of his employment, provided the criminal intent necessary to warrant the imposition of such damages, is brought home to the corporation."

And again: "The jury were thus told, in the plainest terms, that the corporation was responsible in punitive damages for wantoness and oppression, on the part of the conductor, although not actually participated in by the corporation. This ruling appears to us to be inconsistent with the principle above stated, unsupported by any decision of this court, and opposed to the preponderance of well considered precedents."

In Wordrobe v. California Stage Co., 68 American Decisions, 231, it is said: "In the *Amiable Nancy*, 3 Wheat 546, which was a case of a marine trespass brought against the owners of a privateer for an illegal seizure, Judge Story, in delivering the opinion of the court, holds the following language: 'Upon the facts disclosed in the evidence this must be pronounced a case of gross and wanton outrage, without any just provocation or excuse. Under such circumstances, the honor of the country and the duty of the court equally require that a just compensation should be made to the unoffending neutrals for all the injuries and losses actually sustained by them. And if this was a suit against the original wrongdoers, it might be

proper to go yet further, and visit upon them, in the shape of exemplary damages, the proper punishment which belongs to such lawless conduct. But it is to be considered that this is a suit against the owners of a privateer, upon whom the law has, for motives of policy, devolved a responsibility for the conduct of the officers and crew employed by them, and yet, from the nature of the service, they can scarcely be able to secure to themselves an adequate indemnity in cases of loss.' Other authorities might be cited to the same point, but the rule is so well founded in principle and justice that we deem it unnecessary."

In Hagan v. Providence and Worcester R. R. Co., (R. I.) 62 American Decisions 376, it is said: "In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness, or wickedness on the part of the party at fault as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality; yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's act. No man should be punished for that of which he is not guilty."

In Pittsburgh &c. R. Co. v. Russ, 57 Federal Reporter, 822, it is said: "In the case of Railroad Co. v. Prentice, 147 U. S. 101, 13 Supt. Ct. Rep. 261, decided since the trial of this case, it was held that a railroad corporation is not liable to exemplary or punitive damages on account of illegal, wanton and oppressive acts of its conductors or other subordinate agents. The decision rests upon the principle, applicable alike to corporations and individuals, 'that no man should be punished for that of which he is not guilty;' and, consequently, that it is enough that the principal is responsible for the actual consequences of wanton or malicious conduct of an agent within the line of his employment, and not

beyond that, unless he has been in some way particeps criminis."

In Forham vs. Consolidated Traction Company, (N. J.) 6 Amer. Neg. Reports 601, it is said: "A principal, whether an individual or a corporation, cannot be charged with punitive damages for the illegal, wanton or oppressive conduct of a servant, unless the principal participated in the wrongful act of the servant, either expressly or impliedly, by his conduct authorizing or approving it either before or after it was committed. Punitive damages are in the nature of a penalty, especially designed as a punishment for the wanton conduct or malicious motives of a tort feasor, and can be lawfully imposed only when the reprehensible act is brought home to the defendant."

In Bank vs. Pacific &c. Co., 103 Federal Reporter, 841, it is said: "Exemplary or punitive damages are always penal in theory and are only imposed for the sake of punishment, or by way of example, in addition to compensatory damages, where the defendant has acted with malice or guilty intention. While the employee of the defendant in the present case is shown to have acted with intent to defraud in sending the forged telegram, he is personally punishable for that crime, and there the punishment must cease, as the defendant neither authorized nor ratified the employee's act and cannot be held liable in exemplary damages, upon the principle that no person should be punished for that of which he is not guilty. This question is thoroughly discussed in the case of Railway Co. vs. Prentice, 147 U. S. 107, 13 Sup. Ct. 261, 37 L. Ed. 97, and the rule there announced has been unvaringly followed in the consideration of similar cases. Railway Co. vs. Russ, 6 C. C. A. 597, 57 Fed. 822; McGhee vs. McCarley, 33 C. C. A. 629, 91 Fed. 462."

In Garrick vs. Railroad Co., 53 S. C., 448, the question was whether exemplary damages were recoverable under Lord Campell's Act. Discussing the two kinds of damages, the Court says: "Compensatory damages and exemplary or punitive damages are of an entirely different nature and rest upon wholly different principles. The former is intended to provide a recompense for injuries sustained, while the

latter is *intended only as a punishment to the wrongdoer*, and to furnish an example to him and other wrongdoers of the danger attending the wrongdoing. . . . The Legislature having said that its object was compensation, the courts have no authority to say that its object was punishment also."

Although the corporate principal might be held liable in compensatory damages for the act of the agent, "still it does not follow that they are to be visited with damages by way of punishment, without proof that they directed the act to be done, or subsequently confirmed it. Such damages," the court observes, "are given by way of punishing the malice or oppression, and are graduated by the intent of the party committing the wrong. But in an action against a principal for the act of an agent, how can the question of their assessment be properly submitted to the jury, when there is no evidence connecting the principal with such intent on the part of the agent? Clearly it cannot," is the conclusion. Milwaukee, etc., R. Co. v. Finney, 10 Wis. 388.

As shown by these authorities, the highest in this State and the highest in the United States, the object of punitive damages is *punishment*, as the term implies. It is in no sense *compensation*, as distinctly described in the Garrick case.

In former times, and now, in some of the States, the entire doctrine of punitive damages has been repudiated. Nowhere are the objections to it more forcibly put than in the case of Spokane &c. Co. v. Hoefer, (Wash.) 11 L. R. A., 691. The opinion is worthy of careful study. The objections are, (1) The rule of reasonable doubt in criminal cases gives way to that of preponderance of evidence. (2) The defendant may be compelled to testify against himself. (3.) He is deprived of the right to face his witnesses, as testimony may be taken by commission. (4) The measure of compensatory damages is unstinted; actual loss, physical pain, mental anguish, indignity, humiliation, disfiguration, loss of reputation, loss of honor, impairment of credit, every actual loss "and some which frequently border on the imaginary." It is unreasonable that plaintiff should, after this unstinted measure, be allowed additional compensation. (5) The danger

of allowing this power of punishment, which is confided to the Judge, to the unguided judgment of the jury. (6) The difficulty of its proper application.

This is referred to, not for the purpose of disturbing the rule which has been firmly established, of allowing punitive damages in a proper case, but for the purpose of impressing upon the Court the danger of extending the doctrine beyond its legitimate scope.

Being intended as a punishment, it would seem that the person to be punished should be the one guilty of the wrongful motive. By a legal fiction the act of the agent is made the act of the principal, and by a similar course of reasoning a motive, which the principal did not in fact entertain, is imputed to him for punishment.

The principal no less than any other good citizen disapproves the malicious act of his agent. He, as much as any other good citizen, is interested in the punishment of the guilty party, and yet he who disapproves of the act, who wishes to see it punished, is made to present himself as a vicarious sacrifice to atone for something he has not done, while the guilty party escapes. It is not right, it is not just. It seems incredible that the law should carry the legal fiction of the identity of the master and servant to such an extent; and we submit that it cannot do so. It is punishing one man for what another has done and is taking his property without due process of law.

"An act of the Legislature which arbitrarily made one person liable for the debts or responsible for the acts of another would deprive him of due process of law."

Camp v. Rogers, 44 Conn. 291.

In *In Re Ah Lee* 5 Fed. 899, the Court, per Deady, J., said that the 14th Amendment of the Federal Constitution, providing that no State shall deprive any person of life, liberty or property without due process of law, "forbids a State to act towards individuals in disregard of what are generally deemed fundamental principles. So far then it is a bulwark against local tyranny and oppression."

Judge Cooley says that the following statement by Justice Johnson, in Bank v. Okely, 4 Wheat. 235, "embodies more

tersely and accurately the correct view of principle"; "They were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice;" and adds his own definition of due process of law: "Due process of law in each particular case means such an execution of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

"In many cases the courts, in the exercise of their ordinary jurisdiction, cause the property vested in one person to be transferred to another, either through the exercise of a statutory power, or by the direct force of their judgments or decrees, or by means of compulsory conveyances. If in these cases the courts have jurisdiction, they proceed in accordance with the law of the land; *and the right of one man is devested by way of enforcing a higher and better right in another.*"

Cooley Const. Lim. 439.

Is it possible to say that a man who by the policy of the law is answerable in compensatory damages to another, who has suffered by the wilful tort of a servant, shall respond in punitive damages also? Can it be said that he is thus divested of his property by way of enforcing a higher and better right in the person damaged? The person damaged has his action for compensatory damages against the master, and this is farther than the courts of this State went at one time; (in Damner v. R. Co., 4 Rich. 335, it is held that the defendant would not be liable for the wilful act of the engineer in running over the cattle;) he has his action for compensatory and for punitive damages against the servant; the criminal Courts are open to him for a prosecution for malicious trespass; it is inconceivable that he should have a "higher and better right" to take the master's property as a punishment for an offense which he did not commit, for a motive which he did not entertain but condemned and forbade.

"The right to private property is a sacred right. . . . But as it is a right which rests upon equities, it has its reason-

able limits and restrictions; it must have some regard to the general welfare and public policy."

Cooley Const. Lim. 438.

Does it conduce to the general welfare to punish a man for an act which he did not commit? It has been supposed that the object of punishment is to prevent the repetition of the offence by the offender and to deter others. Does the punishment of the master tend to prevent the repetition on his part of an offense which he did not commit? Does the punishment of the master tend to prevent other persons from allowing their servants to commit wilful torts, when every energy of organized capital in industrial occupations is directed to prevent acts of negligence even, much more acts of wilful wrong?

To further the ends of justice, to foster the general welfare, to enforce the dictates of public policy, punish the offending servant; teach him not to repeat the offense; deter other servants by the force of example from similar acts.

But, it may be suggested, the punishment of the master will make him more careful in the selection of his servants. The recovery of compensatory damages will fully accomplish this purpose, and, besides, if the master has shown a reckless disregard of his duty in the selection of competent servants the law of punitive damages will reach him. Few men are totally depraved and malicious. Few homicides are committed as the result of such total depravity. They occur often upon the spur of the moment, totally unsuspected by the perpetrator. So with such acts upon the part of a servant. The greatest care on the master's part cannot foresee and guard against them.

It is claimed however that this does not raise a Federal question. We submit that it does. The Supreme Court of the United States has decided in the Prentice case that the object of punitive damages is to punish the offenders, and that a master cannot be punished for an act and motive which he did not commit or entertain. It is the punishment of one man for what another does.

IV.

The Supreme Court of South Carolina erred in its construction

and application of the act of Congress relating to automatic couplers.

(1.) The car upon which the defective coupler was, is shown by the testimony to have been a car upon the side track; it is not shown to have been used to move interstate commerce; the Act was therefore inapplicable.

By the plain terms of the Act it applies only to cars "used in moving inter-state commerce."

Johnson vs. R. Co., 117 Fed. 462, sustains this obvious statement and holds:

"Vacant cars in yards on side tracks, in repair shops, or in trains which are not loaded with or in use to move articles of interstate commerce, do not fall within the terms or meaning of the Act of March 2, 1893." It was accordingly held that a dining car which was standing empty on a side track, at an intermediate station, where it had been left by a train engaged in interstate commerce until it should be taken by another train engaged in the same traffic, going in the opposite direction, and which was intended for use in interstate commerce, and which was drawn by a freight engine from the side track, to the turn-table and placed again on the side track, was not used in moving interstate commerce while it was on the side track and while being turned. The Act was therefore held inapplicable to such a case.

The exception raising this question (f. 297) is accompanied with the statement that the point was not raised before the Circuit Judge. That is true, but the matter was not up until the Judge charged the jury and it was impossible then to raise it. It certainly was not conceded anywhere in the case that the Act was applicable to any part of the case.

(2.) The Act applies only when the Railway Company fails to use cars equipped with automatic couplers. It does not apply when the Company has equipped its cars with such couplers, one of which is temporarily out of repair.

The charge of the Judge was as follows: "If you believe that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence, &c."

This law was inapplicable to the case, as it appeared beyond dispute, in the complaint and in the evidence that the car in

question was equipped with automatic couplers, which, when in order, permitted a coupling automatically by impact. It appeared in like manner that there was a certain pin out of the coupler which allowed the coupling pin to be drawn entirely out of the draw-head; and to this extent the coupler was defective. As a matter of fact the car, owing to this defect, was not equipped with a coupler which would work automatically; but plainly, the Act of Congress should not apply to a temporary defect, one which could be remedied in two minutes according to the plaintiff's own statement. The error of the Circuit Judge, we submit, was in practically holding that a coupler which in a normal condition complied with the Act of Congress, would not do so if temporarily out of repair. The jury naturally concluded that if there was a broken part in the coupler which prevented, for the time being, an automatic coupling, it was not such a coupling as the law required. The point of abrasion, the hurting point, in the charge, was this; if the Company had not complied with the Act of Congress the failure to do so was negligence per se; if it had complied with the Act and the appliance was temporarily out of repair, the Company's negligence in such event became a question of fact for the jury, they passing upon the question whether the Company had exercised ordinary care in keeping it in repair. How the little pin got out of the coupling pin no one knows; the car was on a side track near the Factory store, in a factory village, where hundreds of people congregate, and the trouble may have been caused by some meddler. Upon the question of ordinary care the jury was not allowed to pass. They were told if it was in a condition which would not admit of automatic coupling, the Company was guilty of negligence, under the Act of Congress.

A conclusive reason, it seems to us, why the Circuit Judge was wrong in his construction, is this: the Act provides a penalty of $100 for a violation of the requirement. It would hardly be contended that a temporary defect in an automatic coupler would subject the Company to this penalty; and yet, if the charge be correct, it would.

(3) In charging that the failure to provide automatic coupler was negligence which continued up to the very moment of the collision, the Circuit Judge eliminated the question of the

plaintiff's duty under Rule 12 to examine the coupler and report the defect immediately.

Rule 12 is set out at folio 230. By it the plaintiff was required to inspect the coupler and not to work with it, if found defective, but to report the defect immediately to his superior officer. This he admits he did not do. The charge eliminates the defence of contributory negligence based upon an infraction of this rule.

"If the defendant in error had access to the rules of the railway company, and was charged with notice of their requirements, and such rules were reasonable, and required the defendant in error, as a brakeman on the train, to inspect the links and drawheads, and the defendant in error neglected to make such inspection, which inspection would have shown the defective character of the link which caused the accident, resulting in the injuries complained of, it is clear that the defendant in error by his own negligence, contributed to his own injury."

Alabama G. S. R. Co. vs. Carrol, 84 Fed. Rep. 785.

"A brakeman was killed by the breaking of a brake which he was attempting to set. Four of the spokes of the brake wheel broke where they joined the rim, and the ends were rusty. The company put in evidence an agreement signed by the brakeman, providing that before working with any cars, engines, machinery, or tools he should examine their condition, and that he should take sufficient time to make the examination, and refuse to obey any order which would expose him to danger. It was held that such agreement only required the brakeman to be attentive and vigilant to discover defects in the machinery, and to refrain from using machinery if he learned it was defective; but it was no defence where it appeared that the defect could only be discovered by an expert. Pratt vs. Lake Shore & M. S. R. Co., 45 N.Y. S. R. 715, 63 Hun. 616, 18 N. Y. Supp. 682, affirmed in 136 N. Y. 654, mem., 32 N. E. 1016, 49 N. Y. S. R. 915."

(4) The act requires that the cars be equipped with couplers, coupling automatically, and which can be uncoupled without the necessity of men going between the ends of the cars. It does not require that they be so arranged as to obviate the

necessity of going between them for the purpose of adjusting knuckles for a coupling. The charge so construes the act.

The Circuit Judge charged the jury that the coupler must be automatic, and so arranged that the coupling may be made by impact, obviating the necessity of going between the cars for any purose to effect the coupling. The Act does not so read. It does provide that so far as uncoupling is concerned it must be so arranged, but the necessity of going between the cars to prepare the knuckles for the impact is made perfectly clear by the testimony on both sides. The Johnson case from 117 Federal Reporter (supra) construing the Act, decides that it is penal in its character and must be strictly construed.

Respectfully submitted,

W. A. Henderson,

T. P. Cothran,

Attorneys for Plaintiff in Error.

Greenville, S. C., April 4, 1904.

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3300

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Clerk.

In the Supreme Court of the United States.

October Term, 1903.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES L. CARSON,
Defendant in Error.

No. 546.

Motion to Dismiss or Affirm and Brief in Support Thereof.

J. ALTHEUS JOHNSON,
For Defendant in Error.

33007

In the Supreme Court of the United States.

October Term, 1903.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES L. CARSON,
Defendant in Error.

No. 546.

Motion to Dismiss or Affirm and Brief in Support Thereof.

Comes now here James L. Carson, the defendant in error, by Mr. J. Altheus Johnson, his attorney, and moves the court as follows:

1. To dismiss in this cause the writ of error to the Supreme Court of South Carolina:

A. Because no federal question was involved in the determination of the cause by the said court, or entered into the judgment of the court.

B. Because the judgment of that court in this cause is fully sustainable independently of any claim set up by the plaintiff in error under the Constitution or laws of the United States.

C. Because no question in this cause was decided adversely to any right claimed by the plaintiff in error under the Constitution or Laws of the United States.

2. To affirm in this cause the judgment of the Supreme Court of South Carolina, because, if any question exists in the case of which this court will take jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

And, in support of the motion thus made, the defendant in error submits the accompanying brief.

J. ALTHEUS JOHNSON,
For Defendant in Error.

Take Notice, That on Monday, April 4, 1904, at twelve o'clock m., or as soon thereafter as counsel can be heard, the foregoing motion will be called to the attention of the Court.

J. ALTHEUS JOHNSON,
For Defendant in Error.

To Mr. William A. Henderson, Counsel for Plaintiff in Error:

Service of the foregoing notice, together with a copy of the motion and the accompanying brief, is hereby acknowledged, this 8th day of March, A. D. 1904.

W. A. HENDERSON,
Attorney for Plaintiff in Error.

33008

In the Supreme Court of the United States.

October Term, 1903.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES L. CARSON,
Defendant in Error.

No. 546.

Brief in Behalf of Defendant in Error.

Statement of the Case.

James L. Carson, the defendant in error, a resident of Greenville County, South Carolina, for the loss of his right arm, brought suit for damages in the amount of $15,000 in the Common Pleas Court of South Carolina for Greenville County. At the time of his injury, August 16, 1902, he was a brakeman running from Spencer, N. C., to Greenville, S. C., on a freight train of the Southern Railway Company. At Converse, S. C., certain freight cars, or boxes, were to be cut off and left on a side track. Standing on the side track at the time were certain other freight cars, or boxes, belonging to the Southern Railway Company, which it was necessary, in the shifting of the cars, to couple together. The defendant in error was ordered by J. C. Arwood, the conductor of the freight train, to do the coupling. The defendant in error perfected the first coupling without difficulty, and, calling to the conductor to hold the train steady (the grade of the side track was rather steep), proceeded to make the second coupling. He discovered, however, when he attempted to make the second coupling, that the automatic coupler was out of order and that the coupling could be made only with his hands. He went between the cars for the purpose, but, before he

had time to effect the coupling, he heard the cars bumping together, and, to save himself, tried to get out from between the cars ; but his right arm was caught between the dead-blocks and crushed, and he was dragged some feet between the moving cars. He had not signalled for the train to back, and it was customary, according to testimony in the case, for the conductor, when a brakeman was making a coupling, to wait, before moving the cars, until the brakeman gave the signal.

The defendant in error, as stated above, brought suit in the Common Pleas Court of Greenville County, and he made the Southern Railway Company, J. C. Arwood, the conductor of the freight train, who had commanded him to do the coupling, and J. D. Miller, the engineer of the train, defendants to the suit. Arwood and Miller were both residents of Greenville County, S. C. The Southern Railway Company is a corporation chartered under the laws of the State of Virginia, engaged in running trains from State to State as a common carrier.

In his declaration Carson charged that his injuries "were due to the joint and concurrent negligence, carelessness and fault of the defendants, and to their joint and concurrent recklessness, carelessness, wilfulness and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit," setting forth the circumstances of his cause of action (Rec. p. 2). The defendants answered separately, each answer, in identical terms, denying all negligence or liability on the part of the answering defendant for the tort complained of and asserting "that the plaintiff's alleged injury was the result of his own negligence." (Rec. pp. 4-5).

Trial was had and the jury found for the plaintiff against the Southern Railway Company $6,500 (Rec. p. 59). On this verdict judgment was entered, and, from the judgment so entered, the Southern Railway Company appealed to the Supreme Court of the State. That court affirmed the judgment, whereupon the Southern Railway Company

prayed for and was allowed a writ of error to bring the judgment of the State Supreme Court before this court for review.

The record in this case (pp. 62-75) shows 48 exceptions noted by the plaintiff in error. These exceptions began with the overruling of the demurrer which each of the three defendants had interposed to the declaration, and ended with the overruling of a motion made by the defendant railway company for judgment notwithstanding the verdict, the latter motion having followed the overruling of a motion in arrest of judgment made by the same defendant.

Some of these exceptions (about 12 in number) sought, in terms, to declare that a Federal question was involved in the case. The exceptions which are thus said by the plaintiff in error to rest upon Federal law center upon two points, namely :

1. The law which provides for the removal of a case from a State to a United States Court ; and

2. The law which provides that railroad companies engaged in interstate commerce shall equip their cars with automatic couplers.

(1). As to Removal of Case.

The defendant railway company did not at any time ask for a removal of the case into the Federal Court ; did not at any time suggest that the conductor of the train and the engineer (who were both citizens of South Carolina) were improperly joined as defendants, or that the plaintiff in joining them had no just hope or expectation of recovery against either or both of them. On the contrary, it admitted the law to be that it had no right of removal when the declaration charged a tort committed jointly by it and two citizens of the State ; but it set up the claim that, under such a declaration, it (the defendant railway company) could not alone be adjudged guilty. In other words,

because it would have the right, if sued alone, to remove the case into a Federal court, it claimed that a verdict in tort could not be rendered against it alone in a suit in which it and other persons had been jointly sued for the tort.

The plaintiff in error, in the assertion of the claim it set up in this regard, noted, among other exceptions, the ones which are numbered 30, 31, 34 and 35, number 30 being an exception taken to an instruction to the jury granted by the trial judge, and Nos. 31, 34 and 35 being exceptions taken to the refusal by the trial judge to grant certain instructions said, by the plaintiff in error, to contain a correct principle of law applicable to the case. The matter to which the said exceptions were taken is the following:

Exception No. 30 (Rec. pp. 69, 56):

"Notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge you that if the proof fails to show such joint and concurrent negligence on the part of all the defendants, yet shows negligence on the part of one or more of the defendants, which negligence resulted in injury to plaintiff as the sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence."

Exception No. 31 (Rec. pp. 70, 58):

"The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant, Southern Railway Company, a foreign corporation, has been deprived of the right, where the tort was not joint and concurrent, to remove this cause to the United States Court. To sustain this action the plaintiff must therefore prove that the acts complained of were the joint and concurrent negligence and tort of the railway company and at least one of the other defendants."

Exception No. 34 (Rec. pp. 70, 58):

"To allow the plaintiff, after alleging a joint and concurrent tort by a foreign corporation and its servant or ser-

vants, to recover damages without proof of such joint and concurrent tort would deprive such corporation of the right of removal to the United States Court, a right guaranteed by the Constitution and laws of the United States, and which would exist were the tort several and not joint and concurrent."

Exception No. 35 (Rec. pp. 71, 58):

"To allow the plaintiff, after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such servant or servants, would deprive the railway company of its property without due process of law, contrary to amendment XIV, Constitution of United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant or servants, which would exist were the tort not joint and concurrent, but simply the wrong of the servant or servants for which the company may be liable."

The exceptions above mentioned (as also exceptions 12, 13, 14, 16 and 17, which presented the same question in connection with the motion for a non-suit) were all overruled. Indeed, as stated in the opinion of the court (Rec. pp. 94, 83), these exceptions were not even argued in the State court, that tribunal having as recently as March of last year decided the cases of Schumpert vs. Southern Railway Company (65 S. C., 332; 43 S. E. Rep., 813) and Gardner vs. Southern Railway Company (65 S. C,, 341; 43 S. E. Rep., 816,) which cases were regarded as concluding the above exceptions so far as the courts of South Carolina were concerned.

The right of a defendant to remove his case for trial from a State to a United States court depends upon the act of Congress, and this Court has repeatedly held that no such right has ever been conferred by Congress upon a defendant in a case like the one now before us.

Chesapeake & Ohio Railway Co. vs. Dixon, 179 U. S., 131.

Powers vs. Chesapeake & Ohio Ry. Co., 169 U. S., 92.

Louisville & Nashville R. R. Co. vs. Wangelin, 132 U. S. 599.

Pirie vs. Tvedt, 115 U. S., 41.

Louisville & Nashville R. R. Co. vs. Ide, 114 U. S. 52.

The case in 169 U. S., above mentioned, was an action brought against the railroad company and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. From that case the court, in the case in 179 U. S., above mentioned, quoted approvingly as follows (179 U.S., p. 137):

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they filed separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' "

Furthermore, the right of removal, in cases where it exists, must be exercised by the defendant before his plea or answer is due; otherwise, the right is waived and lost.

Kansas City R. R. vs. Daughtry, 138 U. S., 298.

Baltimore & Ohio R. R. Co. vs. Burns, 124 U. S., 165.

Besides, the removal of a case on the ground of diverse citizenship does not in the slightest degree change the law under and by which the case is to be decided. If a case arising under and determinable by the laws of a State should, by reason of diverse citizenship, be transferred to a court of the United States, the latter tribunal would administer the identical law which, but for the transfer, the State court would have administered.

Texas & Pac. Ry. Co. vs. Humble, 181 U. S., 51.

The vice underlying the exceptions now under consideration is plainly apparent. The act of Congress under which these exceptions are claimed merely prescribes the circumstances under which a case can be removed for trial from one court into another. The plaintiff in error is seeking to have the statute afford also a criterion or touchstone by which to judge of the litigation on its merits—a matter altogether foreign to the statute. All courts agree, both State and Federal, that a person against whom a tort has been committed, is at liberty to sue jointly all the supposed tort-feasors, and that a judgment, according to the proof produced, may be against one, or all, or some only, of the defendants ; but the plaintiff in error in this case now comes forward with a novel, not to say startling, proposition and hangs it upon the act of Congress which permits a case to be removed for trial from a State to a United States court, namely :—If a citizen of one State should be sued in the courts of another State with citizens of the latter State for a tort commttted, then the question whether a judgment can be rendered against only one defendant depends upon the question whether such defendant, if sued alone, could have removed the case into a court of the United States. The bare statement of such a proposition carries its own answer.

(2) As to the Couplers on its Cars.

The other matter on which the plaintiff in error in this case endeavored to predicate a Federal question is the act of Congress of March 2, 1893 (27 Stat. at L,. 531) entitled, "An act to promote the safety of employes and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," the second section of which act reads as follows: "That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or to permit to be hauled on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

At this point, in connection with the above act of Congress, it is proper to quote the following from the Constitution of South Carolina (1895), Art. IX, Sec. 15, particular attention being called to the passages here printed in italics:

"Every employe of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employes, as are allowed by law to other persons not employes, *when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured*, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. *Knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defense to an action for injury caused thereby*, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. . . Any contract or agreement, expressed or im-

plied, made by any employe to waive the benefit of this section shall be null and void. . The General Assembly may extend the remedies herein provided for to any other class of employes."

Under the law of the State, as announced by the trial judge independently of the act of Congress, the jury was charged as follows, the plaintiff in error, as to the charges thus made, taking the exceptions which are numbered 23, 24, 25 and 26, respectively, the words of the charge only being here quoted, namely:

Exception No. 23 (Rec. pp. 67, 56):

"I charge you that it was the duty of the railway company in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also see that the same were kept in proper repair, and if this duty was negligently performed, and the plaintiff sustained any injury thereby, the railway company is responsible in damages, provided the negligence of the railway company was the direct and proximate cause of the injury, and that the plaintiff did not contribute to the direct and proximate cause of the injury."

Exception No. 24 (Rec. pp. 67, 56):

"I charge you that the risk which a railway employe assumes when he enters the employ of a railway company does not extend to such risks as he is exposed to by reason of defective machinery or appliances."

Exception No. 25 (Rec., pp. 67, 56):

"I charge you that contributory negligence on the part of the servant by using appliances obviously defective, furnished by a railway company, is no longer of force in South Carolina under the Constitution of 1895."

Exception No. 26 (Rec., pp. 67, 56):

"The fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed

to do the work required of him, and he is, therefore, not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor."

These several exceptions were by the Supreme Court of the State overruled, as may be seen in the opinion of the court at page 95 of the record.

Before adverting to that part of the charge which touched the Act of Congress above mentioned, it will be proper to look to another part of the charge (also made under the law of the State, independently of the Act of Congress), the plaintiff in error, as to the charges now to be mentioned, having taken the exceptions which are numbered 27, 28 and 29, respectively. These charges were given in the light of testimony which showed that Arwood, the conductor of the train, had ordered the defendant in error to couple the cars on the side track (Rec. p. 6); that the cars of the defendant railway company (furnished with the Janney coupler) could not be coupled, if the knuckles of the coupler were closed, as they often were, without going between the cars (Rec. pp. 7, 26, 28, 29, 32, 36, 37), and that it was also necessary to go between the cars when the air-brakes needed to be adjusted (Rec. pp. 23, 29, 32, 40); that it was usual for the brakemen of the defendant railway company in making couplings to go between the cars; that the conductor in such cases always awaited a signal from the brakeman before ordering the cars to move (Rec., pp. 8, 24, 26, 29, 37); that the defendant in error, before attempting the coupling in which he was injured, had pointedly told the conductor to hold the train steady (Rec. pp. 7, 8, 11); that the cars, without a signal from the defendant in error and while defendant in error was still between them, were moved on an order from the conductor (Rec. pp. 8, 12, 25, 27, 38, 47, 48). The defense had also put in evidence certain rules of the defendant railway company enjoining brakemen, among other things, from going between cars to couple or uncouple them, or to set pins or links, and requiring brakemen to use

sticks in coupling and uncoupling cars, etc. (Rec. pp. 12, 13). It also appeared in evidence that no pin or stick had been furnished to the defendant in error, and that such had regard to a different method of coupling than was in use August 16, 1902, the time the defendant in error met with his injury (Rec., pp. 8, 29, 32, 36).

The trial court, as stated above, charged as follows under the law of the State, the words of the charge only being here quoted with the number of the exception thereto as taken by the plaintiff in error, namely:

Exception No. 27 (Rec., pp. 68, 56);

I charge you that a rule forbidding railway employes going between railway cars in motion for the purpose of coupling or uncoupling them, or when attached to an engine, within itself is a reasonable requirement, but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and, if it fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done and in the performance of which said rule is violated."

Exception No. 28 (Rec., pp. 68, 56);

"I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine, or in motion, has no application to a case where the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling."

Exception No. 29 (Rec., pp. 69, 56);

"If the jury find that the rule forbidding the going between the cars in motion or when attached to an engine, and forbidding the setting of pins and links, except with a stick, was adopted by defendant railway company when a method of coupling cars prevailed by the use of a pin and link; and if the jury find that the said method of coupling cars has been superseded by a method whereby no pin need be set or pins and links need be used, then it is for the

jury to say whether or not said rule was at the time of the injury complained of in force and whether or not plaintiff was then bound by the same."

These several exceptions were also overruled by the Su-Court of the State, as seen in the opinion of Chief Justice Pope (Rec. p. 95).

It is also under the law of the State, as distinguished from Federal law, that the following charge was made, being part of what is embraced in the exception noted as No. 22 by the plaintiff in error (Rec., pp. 66, 56;)

"The rule of the defendant railway company forbidding employes going between cars for the purpose of coupling or uncoupling them may be waived by it. I charge you that the conductor is the representative of the railway company, and if said company fails to furnish appliances to brakemen, by means of which they may effect said coupling without going between the cars, or furnish them appliances which make it necessary for them to go between the cars to perform the work required of them and without objection, then it is for you to say whether or not such conduct on the part of the railway company amounts to a waiver of the said rule, and if you do find that it amounts to a waiver, then I charge you that in such a case the railway company cannot invoke the said rule in its behalf."

The trial judge also said to the jury (Rec. pp. 55-6):

"I charge you, as a matter of law, that if the plaintiff in any way contributed to the direct and proximate cause of the injury, your verdict should be for the defendants. The law does not allow a man to come into court and recover if he by his own act contributes to the cause of the injury."

And again as follows (Rec., p. 58):

XII. "If the plaintiff in any of the circumstances attending the injury was guilty of negligence which caused the injury, he is not entitled to any damage."

XIII. "Even if the defendants or any of them were guilty of negligence under the circumstances attending the injury, still the plaintiff cannot recover damages if he himself was guilty on account of carelessness which contributed to the proximate cause of the injury.

XIV. "Contributory negligence to any extent will always defeat a recovery, provided it is of the same character as that of the defendant is required to be, namely, a proximate cause of the injury."

XV. "There is no difference in law between the character or quality of the negligence of defendant which will fix a liability upon it, and that of the plaintiff, which will charge him with contributory negligence."

The act of Congress of 1893 above mentioned concerning car-coupling, was adverted to by the trial Court in the following words (Rec., pp. 56, 65), these remarks being the subject of exceptions by the plaintiff in error, numbered 21 and 22 respectively, namely :—

Exception No. 22 (Rec., p. 65, 56) :—

"By act of Congress it is provided that, 'on and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce to haul or to permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' I charge that if you believe the defendant railway company was a common carrier engaged in interstate commerce, and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing plaintiff's injury, and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence on the part of the railway company, which negligence continued up to the very moment of the collision, if you believe there was such a collision and injury in consequence thereof ; and if you believe that such negligence was the proximate cause of such injury, your verdict should be for the plaintiff."

Exception No. 21 (Rec., pp. 65, 56), so much only of the judge's words being here quoted as entered into the exception :—

"The law requires them (railroads) to keep suitable appliances for running such trains, and to keep them in good condition. I charge you that any railroad engaged in running trains from State to State is required, under the law, to have automatic coupling ; and I charge you further that they (the railroads) are required to keep these appliances in good order ; that is, in safe and suitable order."

In overruling these exceptions (noted under the act of Congress) the Supreme Court of the State, through its Chief Justice (Rec., pp. 94–5), declared that no error had been committed by the trial judge in stating the rule established by the act of Congress, and declared also that the rule stated by the trial judge was the law of South Carolina, independently of the act of Congress. To quote from the opinion as to these exceptions Nos. 21 and 22 (Rec. pp. 94–5):—

"The cases in this State," citing four of them, "all hold that it is the duty of the master to furnish safe machinery and appliances to its servants and also to keep such machinery and appliances in good order. The master is not made a guarantor strictly ; but it is his duty to furnish safe machinery and appliances and to preserve it in good order and repair. The Circuit Judge correctly stated the rule in this State. The act of Congress in relation to couplings to cars engaged in interstate commerce peremptorily demands that carriers of interstate commerce shall use automatic couplings on the cars used by them. This defendant was a carrier of freight of interstate commerce, and of course was bound by the act of Congress, no matter what rules it may have adopted for the government of its servants. The Circuit Judge properly stated the rule. It is well known that Congress took control of these matters for wise purposes, among which was the protection of railroad employes. It would be a want of wisdom and a disregard of law for this act of Congress to be emasculated. Of course, Congress intended, when it directed these automatic couplers to be used, that they should not only be provided and attached to cars, but that such appliances should be kept in proper repair for constant use. *It is the law of this State, even if the act of*

Congress in question had overlooked this duty of keeping such appliances in good order, which includes proper repair."

This Court has often declared the conditions under which a writ of error will lie to bring before it for review the judgment of a State court.

Beals vs. Cone, 188 U. S., 184.
Allen vs. Southern Pacific R. R. Co., 173 U. S., 479.
McQuade vs. Trenton, 172 U. S., 636.
Chappell Chemical Co. vs. Sulphur Mines Co. 172 U. S., 465.
Capital Bank vs. Cadiz Bank, 172 U. S. 425.
Harrison vs. Morton, 171 U. S. 38.
Chemical Bank vs. City Bank of Portage, 160 U. S., 646.
DeSaussure vs. Gaillard, 127 U. S., 216.

As stated in the case above mentioned in 171 U. S., at page 47 :

"It is settled law that, to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

It is apparent that the case at bar, under the testimony and the instructions to the jury of the trial court, does not

in anywise depend upon, or involve, the automatic car-coupler act of Congress.

If that act were involved in the case, the record shows that it was involved only with a view to administering it, and not with a view to questioning in any respect its validity or binding efficacy. This court, in construing Section 709 of the Revised Statutes of the United States (the law which confers upon this court the jurisdiction it has over the judgments of State courts), has repeatedly declared that the mere construction by a State court of an act of Congress, however erroneous the constrution may be, does not of itself present a Federal question within the jurisdiction of this court. It is necessary that the plaintiff in error, or person complaining of the judgment of the State court, should have set up, or claimed, in the State court, some "title, right, privilege or immunity," based upon, or derived from, Federal law or Federal authority, and the judgment of the State court must have been adverse to his claim. As said in the leading case of Murdock vs. City of Memphis (20 Wall., 590, 636), a case which so exhaustively considered the law (Sec. 709 R. S. U. S.) as to make subsequent cases but little more than an application of the principles announced inthat case;—

"The decision (of the State court) must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, law or authority of the United States."

In the case at bar, the plaintiff in error claimed nothing whatever under the act of Congress of March 2, 1893, except that *error was committed in the judicial construction* given to the act by the State court. No "title, right, privilege or immunity" based upon that law or derived therefrom, was claimed by the plaintiff in error and refused by the State court. The Federal law had not said that a railway company engaged in interstate commerce *should not be required* to keep its automatic couplers "in good

order, that is, in safe and suitable order," "so as to obviate the necessity of plaintiff going between them (the cars) to effect the coupling" and the State court, disregardful of an exemption or immunity so granted declare that the automatic couplers *must be kept* "in good order, that is, in safe and suitable order," "so as to obviate the necessity of plaintiff going between them (the cars) to effect the coupling." The State court charged the law in the exact language of the Federal statute and then added, supplementary of the statute, a construction which imposed upon the carrier the duty required of it by the State law, asserting at the same time that the same duty was incumbent upon it under the Statute of the United States. The Supreme Court of the State declared the law of the State to be that a railway company shall keep its automatic couplers "in proper repair for constant use" (Rec., p. 95). The gravamen of the error assigned against the construction of the statute as made by the State court is (Rec p. 66);—

"The charge of the judge stamped it as negligence if the plaintiff, in order to make a coupling or to adjust the knuckles, had to go between the ends of the cars."

Does this present a Federal question of which this court will take jurisdiction?

The case of Hannibal and St. Joseph Railroad Co. vs. Missouri River Packet Co. (125 U. S., 260) is a case in which the Packet Company had sued the Railroad Company in a State court for the injury which two of its steamboats had sustained in striking the piers while passing through the draw of a bridge which Congress had authorized the Railroad Company to build across the Missouri River at Kansas City. The act of Congress required that the distance between the piers of the bridge should be 160 feet. The bridge was not built at right angles with the current of the stream, but obliquely at such an angle that a span of 160 feet, measured along the line of the structure, afforded but 153 feet and a fraction in the clear, measured with reference

to the current of the stream. The State court held the bridge to be not a lawful structure under the act of Congress, and a verdict and judgment went against the Railroad Co. for $5,300.00. The Supreme Court of the States affirmed the judgment. The attitude and judgment of the State court toward the bridge, as viewed under the act of Congress which had authorized its construction. is shown in the following words of this court (125 U. S., 268);—

"The Supreme Court of the State of Missouri, in affirming the judgment of the Circuit Court of Jackson county, ruled clearly that the distance of 160 feet between piers of the bridge required by the act of Congress should be obtained by measuring along a line between said piers drawn perpendicular to the faces of the piers and the current of the river : and that, as such line would measure but 153 feet and a fraction instead 160 feet as required, the bridge was not a lawful structure within the meaning of the act."

This court agreed with the State court in the view that the bridge was not built in conformity with the act of Congress, and in that respect declared that no error had been committed by the State court. But the State court had given following instruction (122 U. S., 275) :—

"The jury are instructed that unless the bridge mentioned in the answer had piers which were parallel with the current of the river, and spans of not less than 160 feet in the clear on each side of the pivot pier, then said bridge is an illegal structure and an unlawful obstruction to the navigation of the Missouri river ; and if the jury further believe from the evidence that it was not such a bridge, and further believe that the plaintiff's boats, Alice and St. Luke, or either of them, while attempting to pass through the draw of the bridge in charge of pilots exercising usual and ordinary care, struck the draw-rest of the bridge, and were damaged thereby, then the jury will find their verdict for the plaintiff as to such boat or boats."

Was not that instruction just of the kind as the ones of which the plaintiff in error is complaining in the case at

bar under his exceptions Nos. 21 and 22? And yet this court said of that instruction (125 U. S., 272);—

"It is said that by sustaining this instruction the Supreme Court of Missouri held that the mere fact that the bridge had not been constructed as required by the statute rendered the Railroad Co. liable, *irrespective of the question whether the improper construction caused the accident;* and it is urged that such holding is erroneous.

"This, however, does not present any Federal question for the consideration of this court, and therefore we decline to examine into its merits."

In Jersey City and Bergen R. R. Co. vs. Morgan (160 U. S., 288), a ten cent silver piece, worn "smooth," had been refused as fare by the conductor of a street car. The ejected passenger brought action in the State court against the street car company. The defence was made under the general issue and a special plea of *molliter manus imposuit.* The coin was exhibited in evidence to the jury and much was said about its condition. The defendant, at the close of the evidence, had asked the court to direct a verdict in its favor on the ground that the worn coin was not a legal tender under the laws of the United States; but the trial court gave instructions to cover the case and left it for the jury to say whether the plaintiff, in offering the coin, had lawfully tendered his fare. The verdict and judgment of the trial court were against the defendant company. The Supreme Court of the State sustained the instructions granted by the trial court and affirmed the judgment, saying in its opinion (as quoted from in this court, 160 U. S., 292);—

"It seems by these statutes (of the United States) that so long as a genuine silver coin is worn only by abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value."

This court said (160 U. S., 292);—

"The claim which defendant now states it relied on, is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the State courts so adjudged, the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it."

This court said further (p. 293) ;—

"Although denying plaintiff's claim, defendant did not pretend to set up any right it had under any statute of the United States in reference to the effect of a reduction in weight of silver coin by natural abrasion," giving this as an additional reason for declaring itself to be without jurisdiction to entertain the case.

Indeed, this court, since the decision in Murdock vs. the City of Memphis, above cited, has persistently refused, on a writ of error to a State court, to consider any question not Federal in character, or to consider a Federal question even, unless "the title, right, privilege, or immunity," constituting the Federal question, were specially set up and claimed in the State court.

Myrick vs. Thompson, 99 U. S., 291, 297.
Bonaparte vs. Tax Court, 104 U. S., 592, 595.
Sayward vs. Denny, 158 U. S., 180, 183.
Oxley Stave Co. vs. Butler Co., 166 U. S., 648.

And it is not enough that the plaintiff in error set up and claim a Federal question. The question, to give to this Court jurisdiction, must be a real and not a fictitious one —a real substantial question, on which the case may be made to turn. As said by this Court in New Orleans Waterworks Company vs. Lousiana (185 U. S., 336);—

"There must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that

its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up."

This court has also, with persistent uniformity, declined to review the judgment of a State court, upon a Federal question of even the most meritorious character, if the judgment of the State court is sustainable on other than Federal ground.

Jenkins vs. Loewenthal, 110 U. S., 222.
Adams County vs. Burlington and Mo. R. R. Co., 112 U. S., 123.
Hale vs. Akers, 132 U. S., 554.

It is interesting, as we pass, to note, in this connection, the careful regard which this tribunal, in the discharge of its high duty under the Federal Constitution, has always manifested for the rights of the State when acting within the sphere which belongs to the State. Ever ready to assert and maintain its own high jurisdiction as the expounder of Federal law, it has at the same time (and the fact challenges admiration) been scrupulous to recognize and preserve the independent jurisdiction of the State. Often called upon to decide questions determinable by the laws of the several States, this august tribunal has never hesitated to accord to the highest court of a State the exposition of the laws of the State, never itself assuming to occupy hostilely ground which belongs to a State. An instance or two will illustrate.

This court, in 1881, in a case which came up from the United States Circuit Court for the district of Nebraska, had occasion to construe the will of a citizen of Nebraska, who, dying in 1869, had left his lands, now constituting a part of the City of Lincoln, to his wife, so long as she remained his widow, with the right to dispose of the same, and to his children if she should remarry

(the phaseology of the will is not here given, only its general character indicated). The widow in March, 1870, sold part of the land (a number of lots) and in December, 1879, remarried. The question before this court in 1881 was whether the estate received by the widow's grantee had determined on the widow's remarriage. This court (as seen in Giles vs. Little, 104 U. S., 291) held that the grantee's estate had determined, holding that the will had conferred upon the widow only an estate during widowhood, and that the remainder in fee had passed to the children of the testator upon the remarriage of the widow.

Later, the same will, in connection with other of the lots which had been sold by the widow, came for construction before the Supreme Court of Nebraska, and that court (as seen in Little vs. Giles, 25 Neb., 313) held that the grantees under the deeds from the widow had acquired all the title the testator possessed to the lands.

Still later, the will came again into the courts of the United States, in connection with lots which the widow had conveyed, and we see this court, because the question was one of local law under a statute of the State, overruling its decision in 104 U. S., and (as reported in Roberts vs. Lewis, 153 U. S., 367) directing the United States Circuit Court of Appeals to follow the decision of the Nebraska State court, as reported in 25 Nebraska, 313.

Again, this court in 1879, in a case from the District of Columbia, had occasion to construe the act of Congress which fixed the rate of interest in the District at six per cent. per annum, with permission to the parties, by special agreement, to fix their own rate not to exceed ten per cent. per annum. The question before the court was what rate prevailed after maturity of the obligation when the special contract was silent on that point. This court held (Holden vs. Trust Company, 100 U. S., 72) that the special rate ran until the maturity of the debt, and that after maturity the debt drew interest at the legal rate of six per cent per annum. The State of Illinois had a statute on the subject of interest

precisely similar to the act of Congress for the District of Columbia, and this court, in 1881, in a case which came up from the United States Circuit Court for the Northern District of Illinois, held under the Illinois statute that the contract rate continued, not only to the maturity of the debt, but until the debt was paid, departing from its construction of a similar statute for the District of Columbia, because, as said by the court, "a different rule has been established in Illinois by the decision of the Supreme Court of that State" (Ohio vs. Frank, 103 U. S., 697). As had been said by this court previously, concerning interest in a case which had come up from Iowa, "The question is one of local law under a statute of a State, and the construction given by its tribunals should conclude us" (Cromwell vs. the County of Sac, 96 U. S., 51, 62).

One other instance;—This court, in 1884, after an elaborate consideration of the subject and a review of cases, both English and American, adopted the rule that a common carrier, by a special contract, could limit its liability, even for injuries resulting from its own negligence (Hart vs. Pa. R. R. Co., 112 U. S., 331). A different rule had theretofore prevailed in Pennsylvania, but the Common Pleas Court for Pittsburg sought to follow the decision of this court. The Supreme Court of the State, however, in reversing the Pittsburg Common Pleas Court, declined to follow the rule announced in the Hart case, *supra*, saying (Grogan vs. Adams Express Co., 114 Pa. St., 523, 530);—"Our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform and we prefer to adhere to it." To this declaration of the law in Pennsylvania, as made by the Supreme Court of the State, this court has had occasion to speak quite recently-

indeed, during the present term of the court. A race horse had been shipped from Albany, N. Y., to Philadelphia, Pa., on a contract which declared the liability of the carrier to be limited to $100. Such contracts are upheld in New York where the rule obtains which is announced in the Hart case, *supra*. The car in which the horse was shipped was run into while standing on the track at Philadelphia by a heavily loaded train and the horse injured. Suit was brought against the railroad company in the Common Pleas Court for Philadelphia and at the trial the court permitted evidence to be given of the value of the horse and the actual damage sustained. Verdict and judgment went against the railroad company for $10,000 and the judgment was affirmed by the Supreme Court of the State. The railroad company brought the judgment into this court on a writ of error, but this court said (Pa. R. R. Co. vs. Hughes, 191 U. S., 477, 486) ;—

"The highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity or privilege, *the creation of the Federal power*, has been asserted and denied."

Two of the assignments of error which had been made in the above case were to the refusal of the trial court of the State to charge the jury as follows ;—

1. "That said contract must be interpreted and enforced here (in Pennsylvania) by the law of the place where it was made (New York) , within which State it was partly performed."

2. That the plaintiff is not entitled to recover in excess of $100."

But this court said (191 U. S., 485) ;—

"Neither of these assignments of error presents a Federal question in such sense as to give this court juris-

diction to review the judgment of the State court under section 709 of the Revised Statutes of the United States. Nothing is better settled in Federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege or immunity under the Federal Constitution or laws set up and denied in the State courts."

When the State court, in the case at bar, charged under the act of Congress, it charged in the words of the statute, adding that the automatic coupling required by the statute must be kept "in good order, that is, in safe and suitable order" (Rec. page 65). What right, privilege or immunity, existing by reason of Federal law, did the plaintiff in error invoke against that charge? What right, privilege or immunity, possessed by the plaintiff in error under Federal law, was violated or disregarded by that charge?

It will be remembered that the plaintiff in the present case (the defendant in error in this court) is not asserting a right which depends for its existence upon the construction to be given to an act of Congress. The act of Congress is not a thing crucial or vital to the cause of action he sets up; it comes in only incidentally, with other things, according as it might affect the question of negligence. Indeed, whether the act of Congress was applicable to the case at all, that is, whether the cars between which on the side track the defendant in error was injured were used in moving interstate traffic, was a fact which the trial court left to the jury for determination; and, if the jury had found the fact to be that those cars were used in such traffic, then, whether the couplers or coupling appliances on those cars were defective or not, was a fact which the trial court likewise left to the jury for determination. And this Court, upon a writ of error to a State court, will not review the judgment of the State court upon a question of fact, even though a Federal question would or would not be presented according to the way in which the question of fact

was decided (Dower vs. Richards, 151 U. S., 658, 663–672 ; Egan vs. Hart, 165 U. S., 188, 189.

The reference made by the trial court to the car-coupling act of Congress did not infringe upon or violate any right, privilege or immunity of the defendant Railway Company existing under or created by any act of Congress or law of the United States. The Supreme Court of South Carolina which passed upon the case, found no error of law committed by the trial court prejudicial to the plaintiff in error ; and the record of the case does not afford any Federal question for the determination of this Court.

The case from first to last rests upon the law of the State of South Carolina. No law of the United States supervened at any point to affect the result. The judgment is wholly sustainable independently of any law of the United States under which the plaintiff in error sought to set up the claim of a right.

The defendant in error respectfully submits that this court should not longer retain the case upon its docket.

J. Altheus Johnson,

Defendant in Error.

33021

Supreme Court of the United States.

No. 546.—October Term, 1903.

Southern Railway Company, Plaintiff in Error, vs. James L. Carson. } In error to the Supreme Court of the State of South Carolina.

[April 18, 1904.]

Carson, a resident of Greenville County, South Carolina, brought this suit in the Court of Common Pleas of that county against the Southern Railway Company, a corporation chartered under the laws of the State of Virginia and engaged in running trains through several States as a common carrier, and J. C. Arwood and J. D. Miller, residents of Greenville County, to recover damages for personal injuries, which, he charged in his complaint, "were due to the joint and concurrent negligence, carelessness and fault of the defendants, and to their joint and concurrent recklessness, carelessness, wilfullness and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit:"—setting forth the circumstances of his cause of action. Among other things, plaintiff alleged that he was a flagman in the employment of the Southern Railway Company, and on the day of the accident was ordered by Arwood, the conductor in charge of a certain freight train, on which Miller was engineer, to do the work of brakeman and to couple some of the cars in the train; that these cars were provided with automatic couplers, but one of them was not in proper condition, which rendered it necessary for plaintiff to go between the cars to effect the coupling; and that the accident thereupon happened by reason of defendants' "joint and concurrent carelessness, negligence, recklessness," &c., in particulars detailed.

Defendants severally demurred, the demurrers were overruled, and defendants excepted. Defendants then answered severally, in identical terms, denying all negligence on the part of defendant, and asserting "that the plaintiff's alleged injury was the result of his own negligence." Trial was had and the jury found for plaintiff against the railway company, judgment was entered, and the railway company appealed to the Supreme Court of the State. That court affirmed the judgment, 46 S. W. Rep. 525, and thereupon this writ of error was allowed.

Mr. Chief Justice Fuller delivered the opinion of the Court:

This case comes before us on motions to dismiss or affirm. There was certainly color for the motion to dismiss as we retain jurisdiction with hesitation, and we will dispose of the case on the motion to affirm.

By some of the many exceptions preserved on the trial and disposed of by the State Supreme Court, it was sought to raise Federal questions in respect of the acts of Congress (1) providing for the removal of cases from a State court to a court of the United States, and (2) providing that railroad companies engaged in interstate commerce shall equip their cars with automatic couplers.

1. The railway company did not at any time apply for the removal of the case to the Circuit Court. Plaintiff below and the company's two co-defendants were citizens of the same State, and the railway company did not make application to remove before trial on the ground of separable controversy or want of good faith in the joinder. Nor did it make such application when plaintiff's evidence was in, nor on the whole evidence. There was no suggestion throughout the trial that the joinder was in itself improperly made, but the contention, as exhibited by the exceptions, was that a verdict could not be rendered against the company alone, because if it had been sued alone it would have had the right of removal. The trial court charged the jury that if the proof failed to show joint and concurrent negligence on the part of all the defendants, yet showed negligence on the part of one or more of them, resulting in injury to plaintiff, as the sole and proximate cause thereof, the jury might find a verdict against such defendant or defendants as the proof showed were guilty of such negligence; and to this instruction the railway company preserved an exception.

The railway company also excepted to the refusal of the court to give several instructions asked on its behalf to the effect that, as by the allegation of a joint and concurrent tort, the company had been deprived of the right to remove the cause, joint and concurrent tort must be made out against the company and at least one of the other defendants; that to allow plaintiff to recover without proof of joint and concurrent tort would deprive the company of the right of removal guaranteed by the Constitution and laws; and of its property without due process of law, in contravention of the Fourteenth Amendment, in that the company would be deprived of the right of reimbursement which would otherwise exist. But these are matters upon the merits, and recovery against one of several defendants does not depend on whether, if sued alone, that defendant might have removed the case. The right of removal depends on the act of Congress, and the company not only on the face of the pleadings did not come within the act, but it made no effort to assert the right. The rule is well settled, as stated by Mr. Justice Gray in *Powers* v. *Chesapeake & Ohio Railway Company*, 169 U. S. 92, "that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers and set up different defences

from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'a defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defence may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

The view thus expressed was reiterated in *Chesapeake & Ohio Railway Company* v. *Dixon*, 179 U. S. 131, where the subject was much considered and cases cited. Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. *Schumpert* v. *Southern Railway Company*, 65 S. C. 332. In that case it was held that under the State Code of Civil Procedure, in actions *ex delicto*, acts of negligence and willful tort might be commingled in one statement as causes of injury; that master and servant are jointly liable as joint tort feasors for the tort of the servant committed within the scope of his employment and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution, was without merit, as the rule was, as laid down by Mr. Cooley, (Torts, page 145,) that: "As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself." And see *Gardner* v. *Railway Company*, 65 S. C. 34. In *Rucker* v. *Smoke*, 37 S. C. 380, and *Skipper* v. *Clifton Man. Company*, 58 S. C. 143, it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the State deprived the company of its property by the rulings of the Supreme Court calls for no remark.

2. The act of March 2, 1893, (27 Stat. 531, c. 196,) provided, in respect of common carriers engaged in interstate commerce, "that on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The trial court in one of its instructions set forth this provision, and told the jury that if they found the railway company was engaged, and these cars were being used, in interstate traffic, and that they were not equipped with the automatic couplers required, such failure was negligence; and it was further charged that railroads were required to keep their appliances in

safe and suitable order. It is objected that the instructions assumed that if the automatic coupler was out of repair, the company failed to comply with the act of Congress, but we do not think so, and the Supreme Court of the State held that there was no error as Congress must have intended that the couplers should be kept in proper repair for use, and moreover, as such was the law of the State, even if the act of Congress had not specifically imposed this duty. By this ruling no right specifically set up or claimed under the act of Congress by defendant below was decided against. There was no pretence that the act of Congress provided that the automatic couplers need not be kept in order, and whether the cars in question were used in moving interstate traffic and whether the coupling appliances were defective or not, were facts left to the jury and determined by their verdict. The recovery was not sought on the single ground of want of safe appliances. That was important in its connection with Carson's being ordered to go between the cars, and it was negligence while he was obeying that order, which was chiefly relied on. At all events, the company did not specially set up or claim any right under the act of Congress or dependent on its construction which was denied by the State courts, and the questions raised on these instructions and numerous others on various aspects of the case were not Federal questions, and need not be considered.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.